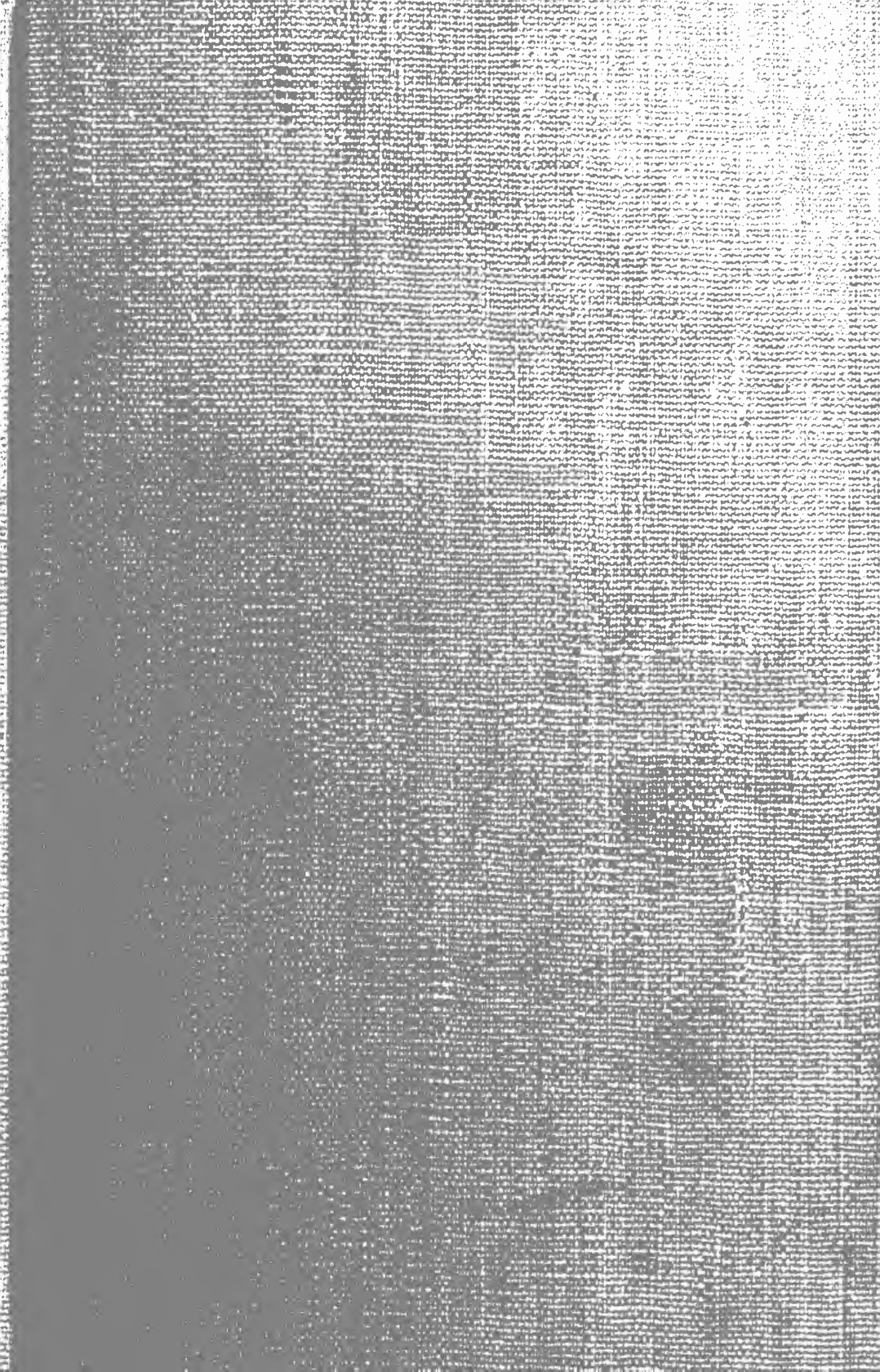

No. 13548

United States Court of Appeals

for the Ninth Circuit.

STANDARD PAPER BOX CORPORATION and DONALD C. RUSSELL,

Appellants,

vs.

CHARLES RUBLE, SR., CHARLES RUBLE, JR., R. T. MILLER, FRANK W. CLARK, JR., GEORGE P. RICHARDSON and ASSOCIATED PAPER BOX COMPANY,

Appellees.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-14-52

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

J. ROBERT MADDOX,
9363 Wilshire Blvd.,
Beverly Hills, Calif.

For Appellees:

LOYD WRIGHT,
CHARLES A. LORING,
WRIGHT, WRIGHT, GREEN AND WRIGHT,
1125 - 111 West Seventh St.,
Los Angeles 14, Calif.

In the United States District Court, Southern District of California, Central Division

Civil Action No. 14151-T

STANDARD PAPER BOX CORPORATION, a Delaware Corporation, and DONALD C. RUSSELL,

Plaintiffs,

vs.

CHARLES RUBLE, SR., CHARLES RUBLE, JR., R. T. MILLER, FRANK W. CLARK, JR., GEORGE P. RICHARDSON and ASSOCIATED PAPER BOX COMPANY, a Washington Corporation,

Defendants.

COMPLAINT FOR: DECLARATORY RELIEF, ACCOUNTING, APPOINTMENT OF RECEIVER, DAMAGES, AND FOR EQUITABLE RELIEF

Comes Now the Plaintiffs, Standard Paper Box Corp., a Delaware Corporation, and Donald C. Russell, Director of Standard Paper Box Corp., and for a cause of action against the defendants alleges as follows:

I.

That the Plaintiff, Standard Paper Box Corporation, was duly incorporated under the laws of the State of Delaware; and is doing business in the State of California as a foreign corporation, and has issued and outstanding at the present time,

Eight Thousand Two Hundred Fifty-four (8,254) shares of 5% Preferred Stock, having a total par value of $206,350.00 and Nine Thousand Four Hundred Eighty-six (9,486) shares of common stock of no par value; that it is [2*] in the business of manufacturing and selling paper boxes and kindred items thereto throughout the United States and, among other places, operates as follows:

(a) Principal office and place of business at 3837 Broadway Place, Los Angeles, California, where it maintains a manufacturing plant and executive offices;

(b) A branch manufacturing plant at Longview, Washington;

(c) A branch sales office at San Francisco, California;

That said corporate defendant, Standard Paper Box Corporation, for the purpose of brevity, will be herein referred to as "Standard."

II.

That the common shareholders of Standard insofar as it is known to Plaintiff Donald C. Russell, are as follows:

(a) Donald C. Russell, 506 shares.

(b) John A. Russell (father of Plaintiff herein), 255 shares.

(c) Lillian Russell (mother of Plaintiff herein), 573 shares.

(d) Earl K. Russell (brother of Plaintiff herein), 200 shares.

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

(e) Charles Ruble, Sr., Charles Ruble, Jr., R. T. Miller, approximately 6,324 shares.

III.

That Plaintiff Donald C. Russell is a resident of the City and County of Los Angeles, State of California, and has been since February 1, 1951, and now is a duly elected director of Plaintiff Standard and renders legal services in patent matters to Standard.

IV.

That Associated Paper Box Company, corporate defendant herein, was duly incorporated under the laws of the State of Washington, and that all of its outstanding capital stock, consisting of Sixteen Hundred (1600) shares, with a par value of $25.00 per share, is owned and held by Standard; that this corporate defendant, Associated Paper Box Company, is hereinafter for purpose [3] of brevity, referred to as "Associated."

V.

That Defendants Charles Ruble, Sr., Charles Ruble, Jr., and R. T. Miller are residents of the County of Los Angeles and of the State of California. That at all times herein mentioned said Defendants were and now are the owners and holders of the majority of the outstanding common stock of Standard as aforesaid, and have continuously held, and are presently holding, the following offices with Standard:

Charles Ruble, Sr.—President, General Manager and Director.

Charles Ruble, Jr. — Vice-President and Treasurer (Director to February 8, 1952).

R. T. Miller—Secretary and Director.

Further, that said Defendants are also holding the following offices with Associated and have held the same for a length of time unknown to Plaintiff:

Charles Ruble, Sr.—President, General Manager and Director.

Charles Ruble, Jr.—Vice-President and Director.

R. T. Miller—Secretary, Treasurer and Director.

That said Defendants, Charles Ruble, Sr., his son, Charles Ruble, Jr., and his son-in-law, R. T. Miller, when not referred to individually, are hereinafter for the purpose of brevity, referred to as the "Ruble Family."

VI.

That on the 8th day of May, 1952, and for a long time prior thereto Defendants Frank W. Clark and George P. Richardson were and now are duly elected directors of Plaintiff Standard. That Defendant Frank W. Clark, Jr., is employed by Plaintiff Standard as its corporation and tax counsel upon an annual basis. That Defendant George P. Richardson is a foundry manufacturer and is President of the [4] Service Foundry Company. That said Defendants are residents of the County of Los Angeles, State of California.

VII.

That this Court has jurisdiction of the cause by reason of the complete diversity of citizenship of Plaintiffs and Defendants; that the amount in controversy exceeds the sum of Three Thousand Dollars ($3,000.00) exclusive of interest and costs; and, that this action is not collusive for the purpose of conferring jurisdiction upon this Court.

VIII.

That as to the factual matters hereinafter set forth in this Complaint, Plaintiffs are informed and believe said matters to be true, and basing such allegations on such information and belief Plaintiff alleges and avers the following; to wit:

That at all times herein mentioned, the operation of Standard was, and is now being conducted under the direction and supervision of the Ruble Family; that they entered upon a plan and scheme to knowingly and deliberately use Standard and Associated for their own personal benefits and profits, and to perpetuate their control of Standard solely for themselves; all in complete disregard of the rights of Plaintiff Standard and the rights of the minority shareholders of Standard; and, in furtherance of said plan and scheme, individually and in concert with Defendant Associated, they did cause the events hereinafter more particularly set forth.

IX.

The Associated Paper Box Company, now referred to as "Associated," was incorporated under

the laws of the State of Washington during the year 1946, with an authorized paid in capital of $40,000.00 for the purpose of engaging in the operation and conducting of a business for the manufacture and sale of paper products; that said shares of stock were under the direction of the Defendant, Charles Ruble, Sr., who owned, and/or controlled the [5] majority of said shares, and who knew the business to be conducted by Associated would be in competition with the business being then conducted by Standard.

During the latter part of the year 1948 when indications were that Associated had not been successful in its operations but on the contrary was and had been sustaining substantial losses, and had become indebted for approximately $160,000.00, and was without funds or assets to pay its creditors, and was insolvent or unable to meet its maturing obligations, the Ruble Family without authority, caused Standard to purchase the worthless shares of Associated by paying the par or stated value of such shares amounting to $40,000.00 back to the original shareholders including the said Charles Ruble, Sr., and caused Standard to assume approximately $20,000.00 for personal loans allegedly made to Associated by its shareholders and caused Standard to further assume all of the other liabilities of Associated, which were then in excess of $140,000.00 for all of which Standard received the unsecured note of Associated and other practically worthless realizable assets.

As a part of said plan, in order to make funds

available to Associated for the purpose of enabling it to pay off its said note to Standard, the Ruble Family caused Standard to rent the plant and equipment retained by Associated at an excessive minimum rental of $40,000.00 per year and did cause Standard to operate such plant and equipment under the designation of the "Longview Branch of Standard"; that continuously thereafter and ever since the Longview Branch of Standard has consistently, persistently, continuously and admittedly lost large sums of money of a total amount in excess of $200,000.00; that in addition thereto Standard was necessarily compelled, by reason of the operation of the Longview Branch, to absorb costs and expenses which Standard would not have otherwise incurred, thus suffering an additional loss to Standard in an approximate sum of [6] $200,000.00.

That through such wrongful acts on the part of the Ruble Family, Standard became the sole owner of all the outstanding capital stock of Associated and the members of the Ruble Family thereafter each became an officer and director of Associated, and as such have since conducted Associated's business operations, which consist of renting Associated's property and equipment to Standard.

That the Ruble Family, after wrongfully "baling out" the shareholders and creditors of Associated, and having caused Standard to assume all the liabilities of Associated then caused Standard to go on record against paying any dividends to its common shareholders.

That Standard, having been compelled to pay out large sums of money to Charles Ruble, Sr., and his friendly shareholders and creditors of Associated, it became necessary to justify such purchase of Associated, and in purported justification thereof, the Ruble Family have continually operated the Longview Branch under the claim or guise of an alleged tax savings device as will more particularly be disclosed through an accounting; and as a result thereof, the losses sustained to Standard by reason of such wrongful acts of the Ruble Family are in excess of $400,000.00; and that the Ruble Family should be held accountable, individually and severally, to Standard, for all such losses as may be disclosed upon a true accounting, and that such individual defendants be required to pay such amounts to Standard.

That regardless of demands on the Ruble Family to close, sell or liquidate the Longview Branch of Standard, they have refused so to do and persist in their refusal; that even now during the year 1952 the Longview Branch is being operated at a loss of approximately $10,000.00 per month, and in order to prevent further losses to Standard, the Ruble Family should be restrained from further causing Standard to operate the Longview Branch, and the [7] Longview Branch should be closed, sold or liquidated forthwith and that the Ruble Family be held accountable to Standard therefor.

X.

That as a further part of said plan and scheme, during the fall of 1951, the Defendant Charles

Ruble, Sr., without having first obtained the proper authority from the board of directors did cause Standard to enter into a contract to purchase a Miehle Press for the sum of $170,000.00; that said purchase was wrongful in the following particular, to wit:

1. That Standard does not nor can it expect to have a sufficient volume of sales business to sell and distribute the products that will be manufactured by such a press;

2. That to secure the proper financial returns from the operation of such a press, it will be necessary to operate the same for twenty-four (24) hours per day which would make it necessary to hire additional workers;

3. That the installation of said press is to be at the Los Angeles plant of Standard and that such installation there would be impractical and wrongful in that the Los Angeles plant is covered by fourteen (14) individual leases which expire during the year 1953, and that there is no security that Standard will continue to operate at such location after the same expire; and therefore, the cost of removal of said Miehle Press together with the loss of business as the result of such removal would be in excess of $50,000.00.

That it was necessary to secure a loan in excess of $100,000.00 in order to purchase the said Miehle Press, and that by reason of said loan, and to secure the payment of the same, Standard has again gone on record to pay no dividends to its common shareholders until said loan has been paid in full.

XI.

In furtherance of said plan and scheme of the Defendants, [8] the Ruble Family, acting individually or in concert, have contrary to the best interests of Standard, acted in a manner herein set forth in that they have operated and conducted Standard on the theory that they own all of the shares of Standard and thereby have failed to protect, or even regard, the rights of Plaintiff Standard and of the minority shareholders and further, failed to conduct and operate Standard on established business principals, in that, inter alia:

1. Charles Ruble, Sr., did purchase the said Miehle Press as above alleged, without prior approval or authority having been first had and obtained, which purchase was not necessary for Standard's operations and was purchased with the intent of so obligating Standard so that no dividends could be paid for years to come;

2. Did cause to be advanced to the Longview Branch since 1948, sums in excess of $300,000.00 in part to pay over the $40,000.00 minimum rental per annum, which advances were unnecessary and wrongful, for which the Ruble Family herein should be held personally liable to Standard therefor;

3. Did promote the lease of the real estate and building at 2505 W. 25th Place, Los Angeles, California; that the above-mentioned property is owned by Standard and represents an approximate investment of $300,000.00; that the Ruble Family recently caused Standard to lease this property to

one United Disposal Company, covering a five-year term at a rental of $1,000.00 per month, which rental is completely inadequate; that good business judgment would require this property to have been sold to create working capital for Standard, but by reason of this wrongful lease, said real estate is committed for a period of five years and the sale thereof is made remote; that the possibilities of a sale for an adequate amount subject to such lease is unlikely by reason of such a small return on so substantial an investment; [9]

4. Deliberately prevented shareholders from receiving any equitable share of the profits of Standard by wilfully and unlawfully failing and refusing to declare dividends to shareholders for the last five years in spite of the fact that the admitted sales of Standard for such period has been in excess of $10,000,000.00.

5. Through Standard's system of accounting and alleged tax saving device, the surplus account of Standard at the end of 1950 failed to show any substantial increase although substantial sales for the four years prior thereto, beginning in 1947, amounted to approximately $7,350,000.00.

6. Did personally purchase common shares of Standard from disgruntled shareholders for inadequate considerations, while at the same time requiring Standard, without authority, to purchase the preferred shares of such disgruntled shareholders when the same could not be purchased for less than the par value thereof.

7. Have failed to declare dividends for the year

1951 in violation of Section 102 of the Internal Revenue Code.

8. Did charge excessive and unreasonable expenditures, particularly traveling expenses, entertainment, executive expense allowances, and business gratuities which were in effect remuneration in the form of personal living items although disguised as herein alleged.

9. Did purchase a Chrysler Imperial automobile for approximately $5,000.00 for use by the Defendant Charles Ruble, Sr., and a Lincoln automobile for approximately $4,000.00 for the defendant Charles Ruble, Jr., which cars are used mostly for their own individual purposes and for which they should be held accountable to Standard.

10. Did pay to the Defendant Charles Ruble, Jr., the sum of $5,000.00 per annum as salary while he was still attending [10] school, which payment was excessive and wrongful;

11. Did pay the Ruble Family during the year 1951, excessive salaries in violation of the Wage Stabilization Act without complying with the procedure under such Act for such increases;

12. Have caused good and efficient management and organization to be continually lost to Standard because of the preference given by the defendant, Charles Ruble, Sr., to his son, the Defendant Charles Ruble, Jr., and his son-in-law, the Defendant R. T. Miller.

13. In spite of sales of approximately $2,500,000.00 during the year 1951, the gross profits of Standard was only approximately 6%, whereas the

gross profits in similar businesses producing like products, averaged approximately 20% during such year;

14. Did wrongfully maintain a sales office in San Francisco which operated at a continual loss;

15. Continue to pay themselves excessive salaries even though they are not qualified for the requirements of the offices which they now hold.

XII.

That there are circumstances surrounding the business activities of Standard with other persons, firms, corporations, and other entities, not presently known to plaintiffs, in the paper industry that lead plaintiffs to believe, and upon such information and belief plaintiffs therefore allege that there are interlocking and commingling business relationships and arrangements between Standard, and such other persons, firms, corporations and such entities as:

(a) Pacific Paper Board Company controlled by one, E. E. Flood (one of the four original stockholders of Associated). That said Pacific Paper Board Company was a creditor to the extent [11] of $150,000.00 of Associated which said Associated's obligation was assumed by Standard as hereinabove set forth.

(b) United Disposal Company located at 2505 West 25th Place, Los Angeles, California. That said United Disposal Company operates a waste paper plant at said location as tenant of Standard as hereinabove set forth.

That said relationships and arrangements are not for the best business interests of Standard for the

reasons that will become apparent upon the proper accounting of all the books and records of Plaintiff Standard.

XIII.

That on or about the 25th day of April, 1952, John A. Russell filed Action No. 14042 in the United States District Court, Southern District of California, Central Division. That said Action was brought on behalf of all shareholders of Standard against Defendant Ruble Family, Defendant Associated, and against Standard as a nominal Defendant. That said Action prayed for an accounting, declaratory relief, the appointment of a receiver and damages. That for the purpose of brevity said Action will be hereinafter referred to as "Civil Action." That Plaintiffs at the proper time will move to consolidate the within Action with said Civil Action.

XIV.

That on the 8th day of May, 1952, a special meeting of the Board of Directors of Plaintiff Standard was duly held for the purpose of retaining counsel to appear on behalf of Plaintiff Standard in said Civil Action, and for the additional purposes of considering any other business which might come before the meeting. That all of Plaintiff Standard's directors, to wit: Donald C. Russell, Charles Ruble, Sr., R. T. Miller, Frank W. Clark, Jr., and George P. Richardson, were present at said meeting. [12]

XV.

That during the course of said meeting said Civil Action was discussed by said directors. That said

directors did not deny that the facts set forth in said Civil Action were substantially correct, but on the contrary, with the exception of Plaintiff Donald C. Russell, considered the advisability of filing technical objections to said Civil Action. That present at said meeting was an attorney known by all of Standard's directors to be then considering employment and retention by the said Ruble Family for the purpose of defending and protecting the said Ruble Family interests in connection with said Civil Action. That said directors did thereupon formally resolve in the face of Plaintiff Donald C. Russell's objections, to employ said attorney on behalf of Plaintiff Standard for the purpose of asserting technical defenses to said Civil Action.

That thereafter and during the course of said meeting Plaintiff Donald C. Russell made the following motions:

(a) That a special meeting of the shareholders of Standard be called at the earliest possible moment for the purpose of informing said shareholders of said Civil Action.

(b) That a copy of the Complaint in said Civil Action be sent to each and every shareholder of Standard. That in response to the motion the other four said directors of Standard ridiculed, laughed and made fun of Plaintiff Donald C. Russell's desire to inform all stockholders of Plaintiff Standard.

(c) That said Longview Branch of Standard be closed at the earliest practical time after completing pending orders. That each and every such motion failed for the want of a second.

XVI.

That a controversy exists between Plaintiffs Standard and Donald C. Russell on the one hand and the Defendants Ruble Family, Frank W. Clark, Jr., George P. Richardson, and Associated, [13] on the other hand, in relation to: said Civil Action, said Standard board of directors and said Defendant Associated, in that Plaintiffs contend:

(a) That any action taken or to be taken by said board of directors on behalf of Standard is void by reason of said adverse interest.

(b) That the employment of said attorney to appear on behalf of Plaintiff Standard is void by reason of said adverse interest of said attorney.

(c) That Plaintiff Standard is under the domination and control of Defendant Ruble Family through a dummy board of directors; that said Plaintiff Standard has no proper board of directors. That the said Defendant Ruble Family through the said dummy board of directors have a duty by reason of premises to dispose of the common stock of Defendant Associated, to sever all business relationships with Associated and/or to wind up and dissolve said Associated.

All of which Defendants and each of them dispute.

XVII.

That said individual defendants herein are either partners to the plan and scheme as aforesaid or have, after acquiring knowledge of said plan and scheme, countenanced the same and are for such reasons incapable of discharging their duties, re-

sponsibilities and obligations as officers and/or directors of Standard. That a meeting of said shareholders of Standard should be called under the jurisdiction of this honorable Court for the purpose of holding an election for a new and different Board of Directors. That said individual Defendants should be perpetually restrained and debarred from holding office as officer or director or otherwise in Plaintiff Standard. That pending said election this honorable Court should appoint a receiver with usual and customary powers to manage and control the affairs of Plaintiff Standard. [14]

XVIII.

That the Ruble Family will continue to perform through said dummy board of directors all of the unlawful acts complained of herein. That the assets of Plaintiff Standard will become dissipated and lost if said Defendants continue to so manage and control Plaintiff Standard unless prevented by proper order of Court.

XIX.

That Plaintiffs have no adequate remedy at law to protect and preserve their rights as director and corporation, respectively.

XX.

That it has been necessary to bring this action in order to preserve the rights of all the shareholders of Standard; the honesty and integrity of Plaintiff Standard and in reasonable discharge of the duties of Plaintiff Donald C. Russell as director of Plaintiff Standard as aforesaid. That this honorable

Court should appoint a duly licensed attorney at law to represent Plaintiff Standard herein as well as Defendant Standard in said Civil Action.

Wherefore Plaintiffs pray judgment against the Defendants as follows:

1. That the Court determine the rights of the parties in relation to said Civil Action, said Standard Board of Directors and said Associated.

2. That the operations at the Longview Branch of the Defendant Standard Paper Box Corporation, be immediately terminated and that the plant and equipment of Associated be immediately sold and liquidated and that the proceeds of such sale be turned over to the Plaintiff Standard Paper Box Corporation, or to a duly appointed receiver or receivers.

3. That the individual Defendants Charles Ruble, Sr., Charles Ruble, Jr., and R. T. Miller be compelled to account to Plaintiff Standard for all monies and properties received by said Defendants for the benefit of Plaintiff Standard; and that said [15] Plaintiff Standard have judgment against said individual Defendants for all monies due or owing said Plaintiff and not hereafter accounted for by the said Defendants together with interest therein.

4. That the individual Defendants Charles Ruble, Sr., Charles Ruble, Jr., R. T. Miller, Frank W. Clark, Jr., and George P. Richardson be forever restrained and debarred from holding any office or becoming a director of Plaintiff Standard herein.

5. That it be ordered, adjudged and decreed that a special stockholders' meeting of Plaintiff Standard be held under the jurisdiction of this honorable Court and that a new and different board of directors be elected to manage and control Plaintiff Standard.

6. That an accounting be had as to losses sustained in the operations of the Los Angeles, California, plant, and Longview, Washington, Branch of Standard as a result of the wrongful acts and mismanagement of the individual defendants; and that Plaintiff Standard have judgment against said Defendants for such amount as the Court shall find.

7. That a receiver or receivers be appointed of and for the corporate Plaintiff, Standard Paper Box Corporation, to take immediate charge and possession of its books, records, monies, real estate, leaseholds, debts, claims and property due and belonging to said corporation, and all of its assets, both real and personal, of any kind and description for the benefit of all the shareholders, with power to said receiver or receivers to carry on the business of said corporation, to apply to the courts of any State for the appointment of ancillary receiver, to prosecute and defend in the name of said corporation or otherwise all claims or suits at law or in equity which in the discretion of said receiver or receivers may be necessary or in which it may be advisable for them to appear in order to recover, obtain possession of, or control of or properly conserve and protect the assets, equities, business [16]

and interests committed to their care, custody or control by the decree, and to appoint an agent or agents under them, and to employ such counsel as may be necessary and proper and to do all other acts which might be done by said corporation and may be necessary and proper with such further powers that this Court shall deem necessary.

8. That the Defendants be ordered and directed to deliver unto said receiver or receivers, all property of any kind and nature whatsoever, and/or books of account, papers and documents belonging to, or in any wise pertaining to Plaintiff Standard Paper Box Corporation, or its business.

9. That either the business and affairs of Defendant Associated be wound up, that said Defendant's obligations be paid, the said Defendant Corporation be dissolved and its assets distributed to its stockholders, or that the capital stock of said Defendant Corporation be sold at public auction under the jurisdiction of this honorable Court.

10. For their costs, expenses and disbursements including a reasonable sum for attorneys' and auditors' fees, and for such other and further relief as the nature of the case may require, and which may seem meet, just and equitable in the premises.

Dated: May 14, 1952.

/s/ J. ROBERT MADDOX,
Attorney for Plaintiffs.

Duly verified.

[Endorsed]: Filed May 15, 1952. [17]

[Title of District Court and Cause.]

NOTICE OF MOTION UNDER RULE 12 FOR ORDER OF DISMISSAL FOR LACK OF JURISDICTION, AND OTHER RELIEF AND ORDER

To the Alleged Plaintiff, Standard Paper Box Corporation, a Delaware Corporation; and to Plaintiff Donald C. Russell; and to J. Robert Maddox, Esq., Attorney for Plaintiff Donald C. Russell and to J. Robert Maddox, Esq., the Alleged Attorney for Plaintiff Standard Paper Box Corporation:

You, and Each of You, Will Please Take Notice, that the defendants in the above-entitled action, to wit, Charles Ruble, Sr., Charles Ruble, Jr., R. T. Miller, Frank W. Clark, Jr., George P. Richardson, and Associated Paper Box Company, will, [19] through the undersigned their attorneys, move the above-entitled court on Monday, June 2, 1952, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order dismissing the above-entitled action for want of jurisdiction.

Said motion will be made on the ground that the sole ground of jurisdiction of said action is the alleged diversity of citizenship of the parties; whereas, it affirmatively appears from the allegations of the complaint that plaintiff Donald C. Russell is a citizen of the State of California and the defendants Charles Ruble, Sr., Charles Ruble, Jr., R. T. Miller, Frank W. Clark, Jr. and George P. Richardson are also citizens of the State of Cali-

fornia; that there is no diversity of citizenship between the parties, and the above-entitled court has no jurisdiction of the purported causes of action set forth in said complaint.

Said motion will be based on this notice of motion, the points and authorities attached hereto and made a part hereof, and all of the records, pleadings and files in the above-entitled action.

You Will Please Take Further Notice that at said time and place Standard Paper Box Corporation, a Delaware corporation, will, through the undersigned its duly authorized attorneys, move the above-entitled court for an order dismissing said action as to Standard Paper Box Corporation and withdrawing the name of Standard Paper Box Corporation as a purported plaintiff to said action on the ground that said action was filed purporting to name said corporation as plaintiff without its knowledge, authorization or consent.

Said latter motion will be based upon this notice of motion, the affidavit of Charles Ruble, Sr. attached hereto and made a part hereof, and all of the records, pleadings and [20] files in the above-entitled action.

Dated: May 26, 1952.

LOYD WRIGHT,
CHARLES A. LORING,
By /s/ CHARLES A. LORING,
Attorneys for Charles Ruble Sr., Charles Ruble, Jr., R. T. Miller, Frank W. Clark, Jr., George P. Richardson, Associated Paper Box Corporation, a Washington Corporation, Defendants.

Of Counsel:

WRIGHT, WRIGHT, GREEN and WRIGHT.

LOYD WRIGHT,

CHARLES A. LORING,

By /s/ CHARLES A. LORING,

Attorneys for Alleged Plaintiff Standard Paper Box Corporation.

Of Counsel:

WRIGHT, WRIGHT, GREEN and WRIGHT. [21]

Points and Authorities in Support of Motion to Dismiss for Want of Jurisdiction

I.

There is no diversity of citizenship between the parties.

Tucker vs. New Orleans Laundries (1949) 90 Fed. Supp. 290, affirmed 155 Fed. (2d) 263, certiorari denied Oct. 8, 1951, 96 L. Ed. 33.

Respectfully submitted,

LOYD WRIGHT,

CHARLES A. LORING,

By /s/ CHARLES A. LORING,

Attorneys for moving defendants. [22]

ORDER

Good cause appearing therefor, the time for the service of the foregoing notice of motion is hereby shortened, provided that a copy of said notice of motion be served by mail before 5:00 p.m., May 26, 1952.

Dated: May 26, 1952.

/s/ LEON R. YANKWICH,
Judge of the U. S. District Court.

Affidavit of service by mail attached.

[Endorsed]: Filed May 26, 1952. [23]

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO MOTION OF DEFENDANTS TO DISMISS AND OTHER RELIEF

Statement

The above-entitled action is brought by Donald C. Russell, a voluntary plaintiff, and Standard Paper Box Corporation, an involuntary plaintiff, the former a citizen of the State of California, the latter a citizen of Delaware, against the individual defendants, citizens of the State of California and corporate defendant, Associated Paper Box Company, a citizen of the State of Washington. The relief sought in this action includes damages and

an accounting declaratory and injunctive relief against the defendants named.

Issue

1. The individual defendants and the corporate defendant Associated Paper Box Corporation have noticed a motion in the above-entitled Court to dismiss the complaint on the grounds of lack of diversity [30] of citizenship between parties.

2. One, Charles A. Loring, Attorney at Law, allegedly on behalf of Standard Paper Box Corporation has noticed a motion in the above-entitled Court to dismiss the complaint and to withdraw the name of Standard Paper Box Corporation as plaintiff.

Argument

1. Complete Diversity of Citizenship Is Affirmatively Alleged in the Complaint.

It has long been the rule in questions of complete diversity of citizenship that jurisdiction will be determined upon the basis of the citizenship of indispensable parties only and a joinder of a mere nominal or proper party of a citizenship different from that of an indispensable party will not be sufficient to oust the Court of its jurisdiction.

> "The nominal party plaintiff will be disregarded and jurisdiction determined by the citizenship of the relator where it appears that the latter is in fact the beneficial party in interest."

People vs. Bruce,
129 Fed. 2nd 421 (CCA, 9, 1942)

X Party Nebraska,
209 US 436, 52 L.Ed. 876

"Jurisdiction is not ousted by the joinder or non-joinder of mere formal parties."

Haan vs. City of Clinton,
131 Fed. 2nd 978.

The case of Tucker vs. New Orleans Laundries cited by counsel for defendants in support of his motion is not in point for the reason that the action therein involved was a shareholder's suit brought against officers and directors of a corporation as well as against the corporation itself. The above-entitled matter is not such an action, but is rather an action brought by the corporation against its officers and directors. [31]

It is therefore, respectfully submitted that in view of the fact that Plaintiff Donald C. Russell is a mere formal or proper party plaintiff in the above-entitled matter, that his citizenship should not be questioned for the purpose of determining the jurisdiction of the Court, but only the citizenship of Plaintiff Standard Paper Box Corporation should be questioned, inasmuch as the Corporation Plaintiff is the beneficial party in interest and it is, therefore, submitted that the motion to dismiss should be denied.

2. The motion to dismiss and withdraw Standard Paper Box Corporation as plaintiff is not in conformity with the Federal rules of civil procedure.

This motion is predicated upon Rule 12, FRCP. An examination of this Rule and its Subdivisions indicates that this type of motion is not therein authorized. An examination of the remaining rules does not disclose authorization for any such motion as this.

Plaintiff Standard Paper Box Corporation has been joined pursuant to Rule 19/A FRCP, which provides "when a person who should join as a plaintiff refuses to do so, he may be made a defendant or in proper case, an involuntary plaintiff."

> Cal Cote vs. Texas Pac. Co. and Oil Co. 157 Fed. 2nd 216 (CCA, 5, 1946); Cert. Denied 329 U.S. 782, 91 L. Ed. 671 (1946).

If the existing Board of Directors of Plaintiff Standard Paper Box Corporation intend to properly appear in this action and to assert any objection that they may have as to the authorization of Plaintiff Standard Paper Box Corporation to sue, they should make timely application under Rule 24 FRCP, Subdivision B, which provides:

> "Upon timely application anyone may be permitted to intervene in an action: * * * (2) When an applicant's claim or [32] defense and the main question have a question of law or fact in common."

Upon the granting of leave to intervene pursuant to this Rule, the contentions set forth by this motion may be properly pleaded pursuant to Rule 9/A FRCP, Subdivision A, provides:

> "When a party desires to raise an issue as to * * * the capacity of any party to sue or * * * the authority of a party to sue * * * he shall do so by specific negative averment."

The affidavit of Plaintiff Donald C. Russell, as attached hereto and marked Exhibit A, and by this reference made a part hereof as though fully set forth at length. It is apparent from the reading of this Affidavit, together with those presented in support of the motion, and in view of the allegations of the verified complaint, that this is an attempt to dispose by motion of the very matter at issue which, it is submitted, should await a trial on the merits rather than to be disposed of in a summary manner by affidavit.

Rule 12 FRCP, Subdivision D, provides in substance that the Court in its discretion, may deny such a motion as appears to have been intended herein, until a full and complete hearing thereof by a trial on the merits.

It is therefore respectfully submitted that the motion to dismiss and withdraw Plaintiff Standard Paper Box Corporation from the within cause be denied.

Dated: May 29, 1952.

/s/ J. ROBERT MADDOX,
Attorney for Plaintiffs. [33]

EXHIBIT A

State of California,
County of Los Angeles—ss.

Donald C. Russell being duly sworn deposes and says:

That he is one of the plaintiffs in the within matter. That on the 23rd day of May, 1952, he was and now is a duly elected and acting director of Plaintiff Standard Paper Box Corporation.

That prior to said May 23rd, 1952, a special meeting of the Board of Directors of Plaintiff Standard Paper Box Corporation was noticed by the Corporation's Secretary, R. T. Miller, one of the defendants in the within matter. That said notice provided that the meeting was called:

> "for the purpose of considering the following matters and taking appropriate action with reference thereto:
>
> "1. That certain action entitled 'Standard Paper Box Corporation and Donald C. Russell, plaintiffs, vs. Charles C. Ruble, Sr., et al., defendants,' U. S. District Court No. 14151-PH;
>
> "2. Consideration of employing the law firm of Wright, Wright, Green and Wright to represent the corporation in connection with such action, and in all matters relating and pertaining thereto;"

That said meeting was held on May 23, 1952 and in attendance among others were Plaintiff Donald C. Russell, director as aforesaid, and Charles Ruble, Sr., R. T. Miller, George P. Richardson, and

Frank W. Clark, Jr., all of whom are defendants in the within cause, as well as previously elected directors of Plaintiff Standard Paper Box Corporation.

That at the time of said meeting said defendants as individuals, had retained or were in the process of retaining the firm of Wright, Wright, Green & Wright to represent them in the [34] within cause.

That in spite of the obvious adverse interest between Plaintiff Standard Paper Box Corporation and said individual defendants, said defendants resolved on behalf of said Plaintiff Standard Paper Box Corporation to retain said firm for the purposes enumerated in Exhibit A of Defendant's Notice of Motion. That at said meeting said defendants made no effort whatsoever on behalf of Plaintiff Standard Paper Box Corporation to cause an independent, unbiased investigation to be made into the merits of the within cause.

That your affiant, as director, objected to the calling of the meeting and refused to vote on the motions then presented in view of the adverse and conflicting interests of said defendants.

/s/ DONALD C. RUSSELL.

Subscribed and sworn to before me this 29th day of May, 1952.

[Seal] /s/ NANCY FEATHERSTONE,
Notary Public in and for said
County and State.

Affidavit of service by mail attached.

[Endorsed]: Filed May 31, 1952. [35]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 3, 1952

Present: The Honorable Peirson M. Hall,
District Judge.

Proceedings: Heretofore submitted on defendant's Motion to Dismiss the Action; and Motion Standard Paper Box Corporation to Dismiss and to withdraw its name as a purported plaintiff.

It Is Ordered: That the Motion of the Defendants to Dismiss the Action be granted for lack of jurisdiction on the ground of lack of diversity. This makes it unnecessary to pass on Motion of Standard Paper Box Corp. to dismiss and to withdraw its name as a purported plaintiff. Counsel for Defendants will draw an order.

EDMUND L. SMITH,
Clerk,

By S. W. STACEY,
Deputy Clerk. [37]

In the United States District Court, Southern District of California, Central Division

Civil No. 14,151-PH

STANDARD PAPER BOX CORPORATION, a Delaware Corporation, and DONALD C. RUSSELL,

Plaintiffs,

vs.

CHARLES RUBLE, SR., CHARLES RUBLE, JR., R. T. MILLER, FRANK W. CLARK, JR., GEORGE P. RICHARDSON, ASSOCIATED PAPER BOX COMPANY, a Washington Corporation,

Defendants.

ORDER OF DISMISSAL

In the above-entitled action the motion of the defendants Charles Ruble, Sr., Charles Ruble, Jr., R. T. Miller, Frank W. Clark, Jr., George P. Richardson and Associated Paper Box Company, a Washington corporation, to dismiss for lack of jurisdiction and the motion of Standard Paper Box Corporation, a Delaware corporation, to dismiss said action as to Standard Paper Box Corporation and withdraw its name therefrom as a purported plaintiff to said action came on for hearing before the above-entitled court, Honorable Peirson Hall, Judge Presiding, Wright, Wright, Green and Wright by Charles A. Loring, Esq. [38] appearing in support of the motions and J. Robert Maddox,

Esq. appearing on behalf of the plaintiff, said motions having been duly argued and submitted for decision and it appearing that this court lacks jurisdiction of said action in that it affirmatively appears that there is no requisite diversity of citizenship between the parties.

It Is Ordered that the motion of defendants to dismiss the action for lack of jurisdiction on the ground of lack of diversity be granted and said action is forthwith dismissed.

The Clerk is directed to enter this Order.

Dated: July 14, 1952.

/s/ PEIRSON M. HALL,
Judge of the U. S. District Court.

Presented by:

/s/ CHARLES A. LORING,
Attorney for defendants.

Affidavit of service by mail attached.

[Endorsed]: Filed July 14, 1952.

Docketed and entered July 15, 1952. [39]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF ORDER OF DISMISSAL

Notice Is Hereby Given that Order of Dismissal of the above-entitled action was entered on July 15, 1952.

Dated: July 25, 1952.

LOYD WRIGHT,

CHARLES A. LORING,

WRIGHT, WRIGHT, GREEN & WRIGHT,

By /s/ CHARLES A. LORING,

Attorneys for Defendants and Alleged Plaintiff Standard Paper Box Corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed July 28, 1952. [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Standard Paper Box Corporation and Donald C. Russell, Plaintiffs above named, appeal to the United States Court of Appeals for the Ninth Circuit, from the Order of Dismissal entered in this action on the 15th day of July, 1952.

Dated: At Beverly Hills, California, this 11th day of August, 1952.

/s/ J. ROBERT MADDOX,

Attorney for Plaintiffs Standard Paper Box Corporation and Donald C. Russell.

[Endorsed]: Filed August 14, 1952. [43]

In the United States District Court, Southern District of California, Southern Division

No. 14042-PH Civil

JOHN A. RUSSELL,

Plaintiff,

vs.

CHARLES RUBLE, SR., et al.,

Defendants.

No. 14151-PH Civil

STANDARD PAPER BOX, et al.,

Plaintiffs,

vs.

CHARLES RUBLE, SR., et al.,

Defendants.

Honorable Peirson M. Hall, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiffs:

J. ROBERT MADDOX, ESQ.,
9363 Wilshire Boulevard,
Beverly Hills, California.

For the Defendants:

WRIGHT, WRIGHT, GREEN & WRIGHT,
111 West Seventh Street,
Los Angeles 14, California; by
CHARLES A. LORING, ESQ.

June 2, 1952; 10:00 A.M.

(Other court matters.)

The Clerk: No. 14042-PH, Civil, John A. Russell vs. Charles Ruble, Sr., et al.

Mr. Loring: Ready for the moving party.

Mr. Maddox: Ready for the responding party.

The Court: Is that the same as Standard Paper Box vs. Ruble?

Mr. Loring: It is a different plaintiff, if the court please, but we think the issues are substantially the same.

The Court: Who represents Standard Paper Box?

Mr. Maddox: My name is Maddox, your Honor. In that second matter I represent the plaintiff Donald C. Russell and Standard Paper Box Corporation.

The Court: May these be argued together?

Mr. Maddox: I see no objection to that, as far as I am concerned.

Mr. Loring: Yes.

The Court: This is a motion of all defendants to dismiss?

Mr. Loring: Yes, your Honor.

Does your Honor desire us to argue it now or were you just calling the calendar?

The Court: This is the last matter on the calendar. [2*]

Let me glance at the file here a moment.

Is there an attempt to state a cause of action for fraud in this complaint?

Mr. Loring: Not in my opinion, your Honor.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Maddox: We think the facts as alleged indicate that, particularly with reference to the dealings in connection with a corporation called Associated Paper Box Corporation, which is a wholly owned subsidiary of the defendant Standard.

Mr. Loring: May I interrupt to make a preliminary objection, if the court please?

The matter which is on the court's calendar this morning is the motion of the defendants to dismiss and also make more definite and certain and strike portions of the complaint.

There was only noticed for this morning a motion for security under Section 834 of the California Corporation Code, supported by voluminous affidavits and points and authorities.

Counsel obtained an order of court continuing the hearing on that motion for security until June 23rd. I cannot advise the court which judge signed the order, but I have no doubt that such an order was made.

Now under Section 834 of the Corporation Code it provides that if any such motion is filed no pleadings need be filed by the corporation or any other defendant and the [3] prosecution of such action shall be stayed until 10 days after such motion shall have been disposed of.

We object on the ground——

The Court: Was such a motion filed in both cases?

Mr. Loring: No, your Honor, and the reason it was not filed in the other case is because we felt that there was no doubt about the jurisdiction

question in the Donald Russell case and that case would be disposed of before we could ever get our papers prepared to apply for security.

The Court: The Donald Russell case is the Standard Paper Box case?

Mr. Loring: That is right.

We object to a hearing on the motion in the John Russell case this morning on the ground that a motion for security has been filed and is now pending, and under the Corporation Code all proceedings are to be stayed until that motion is disposed of.

I think that is a very wise provision, if the court please, for this reason——

The Court: What does that code section require? These are stockholders' suits?

Mr. Loring: That is right, minority stockholders' suits.

The sole basis of jurisdiction is diversity. This code section requires certain conditions precedent to the filing of the action and then provides that the defendants may make [4] an application for security to indemnify them for their court costs, expenses and attorneys' fees.

Now the reason I think for the law, that the proceedings are to be stayed until that motion is disposed of, is because the only penalty for failure to post the security if it is ordered by the court is that the action is dismissed and——

The Court: I think the reason for the law is obvious. Perhaps you are too young to historically remember the flock of suits that were filed by

parties who would go in and buy two shares of stock and aggravate a corporation to a point where they would settle.

In other words, all over the country there were groups of lawyers who made their living doing that and nothing else.

So, as far as the defendant was concerned, it was a question of shelling out a few dollars for a settlement or expending many dollars in defense.

Mr. Loring: That is correct, your Honor.

The Court: Can the Standard Paper Box case be heard this morning?

Mr. Loring: Yes, sir.

The Court: Are the points the same?

Mr. Loring: No, your Honor.

The Court: They are different?

Mr. Loring: Yes.

The Court: Well, does not that section provide for [5] bond regardless of the question of jurisdiction?

Mr. Loring: It does, your Honor, but we thought that the Donald Russell case would be disposed of and dismissed without much effort and therefore security wasn't a matter of primary concern like it is in the John Russell.

The Court: What is the difference between the two suits?

Mr. Loring: The difference between the two suits is this, as I read them: the John Russell case alleges that the plaintiff John Russell is a resident of Chicago, Illinois, and that we think

probably unquestionably creates the necessary diversity of citizenship.

The Donald Russell case—I don't think the pleadings show this but there is no doubt about it between counsel—Donald Russell is a son of John Russell. Donald Russell is a California lawyer and the complaint affirmatively alleges that Donald Russell is a citizen of California. Now the directors are citizens of California. On that showing alone there is no diversity of citizenship.

However, they have attempted to create diversity by——

The Court: Your statement is that that is not the required diversity, that there must be diversity between all plaintiffs and all defendants?

Mr. Loring: That is right. They have attempted to defeat that argument by joining Standard Paper Box Corporation, [6] a Delaware corporation, as a plaintiff and in the motion in the Donald Russell case we moved to dismiss for lack of jurisdiction and we also moved to withdraw the name of Standard Paper Box Corporation as a plaintiff on the ground that the naming of that corporation as plaintiff was not authorized by the corporation and that counsel purporting to represent that corporation as plaintiff is not authorized to do it and in support of that motion to withdraw Standard Paper Box as a plaintiff we have presented the corporate minutes under the seal of the secretary of the corporation showing that there was no authority to file that action in the name of the corporation.

I have no doubt but what counsel had in mind was that the corporation was a necessary party to the action and therefore it didn't make any difference whether it is a plaintiff or a defendant.

Our view is that if they couldn't obtain the consent of the corporation to name it as a plaintiff they should have named it as a defendant. This presents a situation in which one director and one minority stockholder has filed an action on behalf of a corporation without any authority of its board of directors or its stockholders or any officer.

But even if Standard Paper Box were to remain as a plaintiff there still would be no diversity by reason of the fact that Donald Russell is a California citizen. [7]

In the Tucker case, which is cited in our points and authorities, a recent case in which the United States Supreme Court denied certiorari, we think that it is clear on the point that there is no diversity.

We would therefore move that that action be dismissed for lack of jurisdiction.

Mr. Maddox—If the court please—my name is Maddox—I appear on behalf of Donald C. Russell, a director in the corporation named plaintiff Standard Paper Box Corporation.

The Court: Who is counsel for Standard Paper Box? Your name is signed on the pleadings, is it not?

Mr. Maddox: I beg your pardon?

The Court: You are signed as attorney for the plaintiff Standard Paper Box.

Mr. Maddox: That is right, your Honor.

The Court: Are you attorney for Standard Paper Box?

Mr. Maddox: If I may explain that by a longer statement than "yes" or "no," I would appreciate the opportunity.

The Court: Very well.

Mr. Maddox: If you have had an opportunity, your Honor, to read the pleadings in both of these cases you will be struck immediately with the difference in the two. Since I am concerned primarily with the second one, which is the one you just mentioned, I will address my remarks to that.

That is an action brought in the name of the corporation [8] against existing directors and officers to recover for monies which they have in some cases taken for their own use, to recover in addition for mismanagement which it is alleged in this case has existed, and in addition to secure a declaration of the rights of the parties.

In particular the declaration to this particular board of directors, which is alleged in the complaint, is in the management and control of a family which owns the majority of the stock and is in fact no board at all, and it is under this state of facts that the existing board of directors, it is contended on the part of Mr. Russell, who is the plaintiff, is not in truth and in fact a board of directors.

The Court: All that might very well be so, counsel, but it goes to the question of jurisdiction in diversity cases and I think the law is pretty

well settled in this Circuit that unless there is diversity between all of the plaintiffs and all of the defendants in a case which depends upon its jurisdiction for diversity that this court has no jurisdiction. And the Ninth Circuit raises that point even the lawyers overlook it. In the case of somebody vs. Santa Fe—nobody touched on it—the Ninth Circuit of its own motion raised that point and sent the action back and held there was no jurisdiction. I think the case is Shine vs. Santa Fe.

Mr. Maddox: I would like to add a few more remarks. [9]

The plaintiff Donald C. Russell in this particular case seeks no affirmative relief whatever. He is merely joined in this case as a nominal party. He brings the action, he verifies the complaint, he joins the corporation, and that is all he does. In the event he is unsuccessful he is undoubtedly responsible for costs.

That is as far as his responsibility goes, as all that is alleged in the complaint, if your Honor has had an opportunity to read my memorandum of points and authorities——

The Court: I just glanced at them.

Mr. Maddox: ——I cited the proposition, which I am sure we are all familiar with, and where diversity of citizenship is an issue which is only determined by the case of considering the indispensable parties on either side, and I submit Donald C. Russell is not an indispensable party.

The Court: Is Standard Paper Box an indispensable party?

Mr. Maddox: It is without any question.

The Court: But it is a party plaintiff, and how can you make Standard Paper Box an involuntary plaintiff when you have not alleged that this is a class action? In other words, Donald Russell and Standard Paper Box, according to the pleadings, are not in the same class.

Mr. Maddox: It is not a class action, your Honor. Counsel has stated that it is, but I don't believe that it is a class action. [10]

The Court: I do not think it is a class action, but my point is you cannot make a person an involuntary plaintiff except for the medium of a class action.

Mr. Maddox: I cited the proposition that you could make them an involuntary plaintiff. Rule 19(a) of the Federal Rules of Civil Procedure provides that: "When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff."

I could see no more involuntary plaintiff than we have here today in view of the affidavits in support of the motion on the other side, and I see no particular reason why there shouldn't be an involuntary plaintiff. No harm would come to them in the event the suit is unsuccessful.

To begin with, Mr. Russell, who is one of the plaintiffs, if he improperly brought this suit is responsible in costs.

In addition, there is an indication by the affidavits filed by counsel for the defendants, as well as for the corporation, that they are not responsible to me for attorney's fees.

Under those circumstances I can see that no harm can come to anyone if, as a matter of fact, there is complete diversity of citizenship.

I chose to put Standard Paper Box Corporation as a plaintiff and submitted that they are citizens of the state [11] of Delaware. Donald Russell was admittedly a citizen of California, but a mere nominal or formal party. He asks for no relief. He asks only to be responsible in case no relief is granted.

I don't see that there is any failure on the basis of the rule stated here in People vs. Bruce, 129 F. (2d) 421, Ninth Circuit, 1942, which says that "the nominal party plaintiff will be disregarded and jurisdiction determined by the citizenship of the relator when it appears that the relator is in fact the beneficial party in interest."

In fact, this plaintiff alleges that this corporation is the beneficial party in interest, that the corporation as an entity is being deprived of its assets, that it has no valid and acting board of directors and that these people that are in management and control are taking its funds. Under those circumstances it certainly is the real party in interest.

The plaintiff Russell, on the other hand, asks for nothing, no money, no other relief of any type, except to have it declared that this corporation has no board of directors, that they have an election

in which a proper board can be elected, that they have these particular officers enjoined forever from operating this corporation in the manner in which they have been so doing. And that certainly, your Honor, is not a class suit. It is a suit as though the corporation had by some fortunate circumstance acquired the [12] management, control and gain, and then go after these individual defendants.

Point out this, your Honor, that this counsel comes in here on one foot, if the court please, and makes a motion on behalf of individual defendants who are the defendants and who are presently the officers and directors, and then he stands on the other foot and says he represents the corporation. If he does, it is the same body, if the court please.

And look at the thing that we have here. We have an admission on the part of this counsel—and I am being as careful as I can when I say this—he admits all of the things in the pleadings to be true. He admits, on the one hand, although he is counsel for the defendant individually, on the other hand he is supposed to be the counsel for the corporation, and here is a situation where these defendants are milking the defendant. How can you come into court and say he represents one or the other? I think he has to represent one. If he comes in here to represent the defendant, let him do so; if he wants to come in and represent the corporation, let him make a proper motion. Let him intervene if he wants to do so. Let him present his pleadings properly and let him allege we had no authority to file this suit. It is a proper matter of issue. It is so provided under the rules

of civil procedure. That case can be tried on the merits and determined whether or not these people have an [13] adverse interest.

I do not believe that it is a proper thing to dismiss this matter at this time on the grounds of lack of jurisdiction when it appears affirmatively on the face of the complaint that this corporation is an involuntary plaintiff and as such makes a complete diversity of citizenship between itself and the individual defendants, and that on the face of it is sufficient.

If your Honor has any further doubt, you have jurisdiction in this matter to have it put over until the hearing on the merits and I think that is the worst that should happen, if the court please.

The Court: You have filed all the memoranda you want to file, both sides? (Assent.)

I will have the matter submitted, and on the John Russell matter, under that code section, I think all matters should be stayed until the hearing and order has been had on the motion for deposit of the costs.

You say that is set for June 23rd now?

Mr. Loring: Yes, your Honor.

The Court: I do not know that I can hear it on that date. It may have to go over until the following Monday, because I am still driving down here and holding court every Monday and from now on I am going to make it every other week instead of every week to go back to Fresno. [14]

Mr. Loring: What day of the week is the 23rd?

The Court: Monday. The 30th is the Monday following after that.

Mr. Loring: If the court please, there is some question about the hearing of that motion for security. Under the code, Section 834, it must be heard within 30 days but the court has authority to extend the period, I believe, for 60 days. I have procured an order from Judge Yankwich extending the time within which that motion could be ordinarily presented until June 24th, and if your Honor cannot hear it on the 23rd I am wondering if your Honor will make an order continuing the date within which I may orally present the motion until after the date that your Honor has fixed.

The Court: It is now set for June 23rd?

Mr. Loring: Yes.

The Court: I will leave it set for June 23rd and it may be that I will be here to hear it that day. But if I am not you take it up with Mr. Stacey, my clerk, who remains here and he will be in touch with me to find out from me in Fresno whether or not I will be here on that date or the following Monday. In the event I cannot hear it on that date, if you will present an order in sufficient time I can make the order within the 30 days.

Mr. Loring: Thank you.

The Clerk: That is all, your Honor. [15]

The Court: Court is adjourned.

(Whereupon, at 10:50 o'clock a.m., court was adjourned.) [16]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the

United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Fresno, California, this 22nd day of September, A.D. 1952.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed September 17, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 52, inclusive, contain the original Complaint; Notice of Motion Under Rule 12 for Order of Dismissal for Lack of Jurisdiction and Other Relief and Order and Points and Authorities; Affidavit of Charles A. Loring in Support of Motion to Dismiss, etc.; Memorandum in Opposition to Motion of Defendants to Dismiss and Other Relief; Order of Dismissal; Notice of Entry of Order of Dismissal; Notice of Appeal; Statement of Points on Appeal and Appellants' and Respond-

ents' Separate Designations of Record on Appeal and a full, true and correct copy of Minutes of the Court for July 3, 1952, which, together with copy of Reporter's Transcript of Proceedings on June 2, 1952, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 17th day of September, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13548. United States Court of Appeals for the Ninth Circuit. Standard Paper Box Corporation and Donald C. Russell, Appellants, vs. Charles Ruble, Sr., Charles Ruble, Jr., R. T. Miller, Frank W. Clark, Jr., George P. Richardson and Associated Paper Box Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 18, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Appeal No. 13548

STANDARD PAPER BOX CORPORATION, a Delaware Corporation, and DONALD C. RUSSELL,

Appellants,

vs.

CHARLES RUBLE, SR., CHARLES RUBLE, JR., R. T. MILLER, FRANK W. CLARK, JR., GEORGE P. RICHARDSON and ASSOCIATED PAPER BOX COMPANY, a Washington Corporation,

Appellees.

APPELLANTS' STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 19 of this Court, the following is appellants' statement of points on appeal upon which appellants intend to rely:

1.

The District Court erred in finding that there is no requisite diversity of citizenship between the parties.

2.

The District Court erred in ordering dismissal of the above-entitled action for lack of jurisdiction on the ground of lack of diversity of citizenship.

3.

The District Court erred in failing to find that Plaintiff Donald C. Russell is a mere formal or nominal party.

4.

The District Court erred in failing to find that Standard Paper Box Corporation is an indispensable party plaintiff whose citizenship is diverse from all of the named parties defendant.

5.

The District Court erred in failing to find that said Court has jurisdiction of said action in that it affirmatively appears that there is the requisite diversity of citizenship between the parties within the meaning and requirement of Title 28 U.S.C.A., SS 1332.

6.

The District Court erred in granting the motion of Defendants to dismiss the action and ordering said action dismissed.

Dated: At Beverly Hills, California, this 19th day of September, 1952.

/s/ J. ROBERT MADDOX,
Attorney for the Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed September 27, 1952.

No. 13548.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD PAPER BOX CORPORATION and DONALD C. RUSSELL,

Plaintiff-Appellants,

vs.

CHARLES RUBLE, SR., CHARLES RUBLE, JR., R. T. MILLER, FRANK W. CLARK, JR., GEORGE P. RICHARDSON and ASSOCIATED PAPER BOX COMPANY,

Defendant-Appellees.

PLAINTIFF-APPELLANTS' OPENING BRIEF.

J. ROBERT MADDOX,
9363 Wilshire Boulevard,
Beverly Hills, California,
Attorney for Plaintiff-Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

No. 13548.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD PAPER BOX CORPORATION and DONALD C. RUSSELL,

Plaintiff-Appellants,

vs.

CHARLES RUBLE, SR., CHARLES RUBLE, JR., R. T. MILLER, FRANK W. CLARK, JR., GEORGE P. RICHARDSON and ASSOCIATED PAPER BOX COMPANY,

Defendant-Appellees.

PLAINTIFF-APPELLANTS' OPENING BRIEF.

Introduction.

This is an appeal by Plaintiff-Appellants (hereinafter called Plaintiffs) from an order of dismissal entered by the District Court of the United States, for the Southern District of California, Central Division, based upon the finding that it affirmatively appears that there is no requisite diversity of citizenship between the parties.

I.
Statement of Jurisdiction.

The complaint alleges jurisdiction to be based upon a complete diversity of citizenship of Plaintiffs and Defendants, and that the amount in controversy exceeds the sum of Three Thousand Dollars ($3,000), exclusive of

interest and costs, and that the action is not collusive for the purpose of conferring jurisdiction upon the Court [R. 7]. Title 28, United States Code, Section 1332, is the statutory provision sustaining jurisdiction.

II.

Statement of the Case.

A. The Facts.

Standard Paper Box Corporation, Plaintiff, alleges in its complaint that it is a citizen of the State of Delaware [R. 3]; that the individual Defendants, officers and directors of the Plaintiff corporation, are citizens of the State of California [R. 5]; and that the corporate Defendant, Associated Paper Box Company, is a citizen of the State of Washington [R. 5].

The Plaintiff corporation seeks by its complaint to recover from all individual Defendants, damages for a civil conspiracy, losses occasioned by negligence, loss of profits, the appointment of a receiver and an attorney to protect and represent Plaintiff Standard Paper Box Corporation, an election of a new board of directors, injunctive relief against all Defendants, and an accounting. The Plaintiff corporation seeks in addition to effect a dissolution of the corporate Defendant, Associated Paper Box Company, as well as declaratory relief. Donald C. Russell, as the only disinterested Director of Standard Paper Box Corporation, joins the Plaintiff corporation in the complaint so that all directors may be before the Court.

Defendants, both individual and corporate, moved, among other things, the Court to dismiss the complaint on the grounds:

> "That Plaintiff, Donald C. Russell, is a citizen of the State of California, and the Defendants, Charles

Ruble, Sr., Charles Ruble, Jr., and George P. Richardson, are also citizens of the State of California; that there is no diversity of citizenship between the parties . . ." [R. 23, 24.]

The Court granted this motion and dismissed the action:

". . . for lack of jurisdiction on the ground of lack of diversity." [R. 33.]

B. The Issue.

Does it affirmatively appear from the allegations of the complaint that there is the requisite diversity of citizenship of the parties within the meaning of Title 28, United States Code, Section 1332?

III.
Specification of Errors.

The asserted errors of the District Court relied upon by Plaintiffs are as follows:

(1) The District Court erred in failing to find that Standard Paper Box Corporation is an indispensable party Plaintiff, whose citizenship is diverse from all of the named parties Defendant.

(2) The District Court erred in failing to find that Plaintiff Donald C. Russell is a mere formal, or nominal, party.

(3) The District Court erred in failing to find that said Court has jurisdiction of said action, in that it affirmatively appears that there is the requisite diversity of citizenship between the parties within the meaning and requirements of Title 28, United States Code, Section 1332.

(4) The District Court erred in granting the motion of Defendants to dismiss the action and ordering said action dismissed.

IV.

Summary of Argument.

GENERALLY, THERE MUST BE A DIVERSITY OF CITIZENSHIP BETWEEN PARTIES PLAINTIFF AND DEFENDANT.

A. THERE MUST BE A DIVERSITY OF CITIZENSHIP BETWEEN INDISPENSABLE PARTIES.

(1) PLAINTIFF STANDARD PAPER BOX IS AN INDISPENSABLE PARTY.

(2) PLAINTIFF DONALD C. RUSSELL IS NOT AN INDISPENSABLE PARTY.

B. LACK OF DIVERSITY OF CITIZENSHIP OF A FORMAL AND/OR NOMINAL PARTY PLAINTIFF DOES NOT OUST THE COURT OF JURISDICTION.

C. PLAINTIFF DONALD C. RUSSELL IS A NOMINAL AND/OR FORMAL PARTY.

D. THERE BEING COMPLETE DIVERSITY OF CITIZENSHIP BETWEEN THE ONLY INDISPENSABLE PARTY PLAINTIFF, STANDARD PAPER BOX CORPORATION, AND ALL DEFENDANTS, THE COURT SHOULD NOT HAVE CONSIDERED THE CITIZENSHIP OF THE FORMAL AND/OR NOMINAL PARTY PLAINTIFF DONALD C. RUSSELL, AND SHOULD NOT HAVE DISMISSED THIS CAUSE.

V.
ARGUMENT.

In Order to Sustain the Jurisdiction of the Court There Must Be a Diversity of Citizenship Between Parties Plaintiff and Defendant.

It is clear from the record that the Plaintiff Standard Paper Box Corporation is a citizen of the State of Delaware, that the Plaintiff Donald C. Russell is a citizen of the State of California, that all the Defendant individuals are citizens of the State of California, and that the Defendant Associated Paper Box Company is a citizen of the State of Washington. It seems patent that for purposes of this appeal that the nature or extent of the interest of any of the Defendants in the controversy or its subject matter is not in issue.

A. There Must Be a Diversity of Citizenship Between Indispensable Parties.

The Federal Courts, being of limited jurisdiction, it is, of course, necessary for a plaintiff to affirmatively allege the basis of jurisdiction. The jurisdictional basis in this cause is predicated upon diversity of citizenship as set forth in Title 28, United States Code, Section 1332:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between:
>
> (1) Citizens of different States; . . ."

To sustain jurisdiction upon diversity of citizenship there must be an "actual" and "substantial" controversy

between citizens of different States. These requirements are fundamental. The parties on either side of an actual or substantial controversy are the indispensable parties to a determination thereof. Whether the indispensable parties are Plaintiffs or Defendants is to be ascertained from the primary and controlling matter in dispute and the principal purpose of the suit. The case of *Hann v. City of Clinton,* 131 F. 2d 978, 981 (C. C. A. 9, 1942), states this rule in the following language:

> "In determining the question whether diversity of citizenship requisite to jurisdiction exists, a Court looks to the citizenship of the real parties in interest; . . ."

The use of the term "real party in interest" is synonymous with the term "indispensable party," as evidenced by Rule 17(a) of the Federal Rules of Civil Procedure, which is quoted in part as follows:

> "Every action shall be prosecuted in the name of the real party in interest:"

The reason for the mandatory requirement of joinder of indispensable parties is not predicated upon the Federal Jurisdictional Rule with respect to diversity of citizenship, but is rather a requirement of any Court in the application of general, equitable law. In the case of *State of Washington v. United States,* 87 F. 2d 421 (C. C. A. 9, 1936), the Court states this rule in the following language at page 427:

> ". . . no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court."

Substantially all of the reported cases which concern themselves with the application of the rule as set forth in *Hann v. City of Clinton,* 131 F. 2d 978 (C. C. A. 9, 1942), *supra,* are factually similar in that the question raised is with respect to a party who has not been named in the complaint. The rules as established by these cases are therefore couched in language concerning the requirement of the presence of a party who has an interest in the controversy and who is absent from the cause. It is submitted that the same test applies respecting a factual situation where a party is present in a cause, has an interest therein, and the question is then raised as to whether or not his presence is indispensable.

The leading case of *State of Washington v. United States,* 87 F. 2d 421 (C. C. A. 9, 1936), above cited, has restated the general equitable law, respecting the requirement of joinder of indispensable parties in the form of a test which the Court must make. This test is set forth in the following language at page 427:

> ". . . (1) is the interest of the absent party distinct and severable? (2) In the absence of such party, can the Court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?
>
> "If, after the court determines that an absent party is interested in the controversy, . . . (and) . . . any one of the four questions is answered in the negative, then the absent party is indispensable."

(1) Plaintiff Standard Paper Box Corporation Is an Indispensable Party.

Assuming for the purpose of analogy and argument that the Plaintiff Standard Paper Box Corporation was not named a party to this cause, and applying the test of *State of Washington v. United States, supra,* it is patent that the presence of the Plaintiff Standard Paper Box Corporation is indispensable to the proceeding.

It is obvious that as a plaintiff, Standard Paper Box Corporation has not only a plaintiff's interest in the controversy but the only real and substantial plaintiff's interest in view of the allegations of the complaint which set forth the following facts: That the Plaintiff corporation is under the domination and under the control of a dummy board of directors, is the victim of a civil conspiracy, and is being deprived of the privileges and profits to which it is unquestionably entitled.

Applying the test No. 1: (1) is the interest of the absent party distinct and severable? It is at once apparent that the only and primary interest involved in the controversy of this action is that of the corporate Plaintiff, and in the absence of a representation of such interest the complaint would not state a claim. The answer to test No. 1 is in the negative.

Applying tests Nos. 2 and 4, the answers to each is also in the negative, for in the absence of the corporate Plaintiff the Court could not in justice appoint a receiver or order an election of directors.

Although the aforementioned test requires only a "no" answer on any one of the four questions, it appears that a "no" answer applies to at least three of these questions; it seems reasonable to conclude, therefore, that Stand-

ard Paper Box Corporation is an indispensable party Plaintiff to the cause whose citizenship is diverse from all of the Defendants in this action.

(2) Plaintiff Donald C. Russell Is Not an Indispensable Party.

That Plaintiff Donald C. Russell has an interest in the controversy (as distinguished from an interest in the subject-matter) is doubtful. The Plaintiff Russell, as a director of the Plaintiff corporation, is a mere fiduciary. Assuming for purpose of argument, however, that such relationship constitutes an interest in the controversy within the meaning of the aforementioned rule, the tests must be applied to determine whether or not he is an indispensable party.

Applying test No. 1, it is apparent that the interest of the Plaintiff Russell, were he absent, is distinct and severable from that of the interest of the Plaintiff corporation. He seeks no personal relief in the form of a money judgment or otherwise, but merely a declaration of the rights and duties of the respective parties with respect to the subject matter of the action. The interest of Plaintiff Russell as a corporate director is distinct and severable from the interest of Standard Paper Box, the Plaintiff corporation.

Applying test No. 2, in the absence of Plaintiff Russell, the Court can render complete justice between the parties before it. The Court, in his absence, can determine the obligations and duties of the Defendants with respect to the Plaintiff corporation. A judgment can be rendered in favor of the corporation, an accounting ordered as against the Defendants, a declaration of the rights of the Plaintiff corporation with respect to the

duties of the Defendants, an election can be ordered held with respect to new directors, an attorney can be appointed to represent the corporation, a receiver can be effectively appointed since all other directors are parties Defendant, and in general all things prayed for in the complaint can be granted in his absence.

Applying test No. 3, such a decree made in the absence of Plaintiff Donald C. Russell could have no injurious effect upon his interest in view of the admitted allegations in the complaint. All relief prayed for, including a declaration of the rights of the parties, the appointment of an attorney for the corporation, an election of a new board of directors, as well as an order enjoining the Defendant directors and officers from holding future office when granted, would not be injurious to him.

Applying test No. 4, a final determination in the absence of Plaintiff Donald C. Russell, would be wholly consistent with equity and good conscience.

Were the facts other than in this cause, to the extent only that the action had been brought by a shareholder in the form of a representative suit, it would not have been necessary to join Donald C. Russell as a defendant, for he is a fiduciary who has neither asked for nor received any interest in the transactions complained of and only the defaulting directors and officers would need to be parties. The case of *Woodruff v. Howes,* 88 Cal. 184, recognizes this proposition at page 201:

> ". . . As to the rest, Howes, Bonebrake, and Merrill are the only persons interested in the trans-

actions complained of. The other directors are only their implements and representatives,' and are not shown to have received, or to have any interest in the fruits of said transactions. It was not necessary to join them as defendants."

It therefore seems reasonable to conclude that Plaintiff Donald C. Russell is not an indispensable party to the cause.

B. Lack of Diversity of Citizenship of a Formal and/or Nominal Party Does Not Oust the Court of Jurisdiction.

The established rule in diversity of citizenship cases in Federal Courts is that the joinder, or non-joinder, of nominal and/or formal parties will have no effect upon the jurisdiction of the Court.

The case of *Hann v. City of Clinton,* 131 F. 2d 978 (C. C. A. 9, 1942), states this rule in the following language at page 981:

". . . and where there is complete diversity between them [real parties in interest], the presence of a nominal party with no real interest in the controversy will be disregarded. *Jurisdiction is not ousted by the joinder or non-joinder of mere formal parties.*" (Emphasis and insert added.)

See:

Wormley v. Wormley, 21 U. S. 421, 5 L. Ed. 651;

Shields v. Barrow, 58 U. S. 130, 15 L. Ed. 158 (1855);

Ex parte Nebraska, 209 U. S. 436, 52 L. Ed. 876, 28 S. Ct. 581 (1908);

Salem Trust Co. v. Manufacturers Finance Co., 264 U. S. 182, 68 L. Ed. 628, 44 S. Ct. 266 (1924);

People v. Bruce, 129 F. 2d 421 (C. C. A. 9, 1942), cert. denied, 317 U. S. 678, 87 L. Ed. 544, 63 S. Ct. 157 (1942);

Blytheville, L. & A. S. R. Co. v. St. Louis San Francisco Ry. Co., 33 F. 2d 481 (C. C. A. 8, 1929).

The Federal Courts in determining whether a given party's interest in the controversy is formal and/or nominal have adhered to the following rule as set forth in the case of *State of Washington v. United States*, 87 F. 2d 421 (C. C. A. 9, 1936), *supra*, where the Court states at page 426:

> ". . . Where he [the party in question] is not interested in the controversy between the immediate litigants, but has an interest in the subject matter which may be conveniently settled in the suit, and thereby prevent further litigation, he [the party in question] may be made a party or not, at the option of the complainant." (Insert ours.)

C. Plaintiff Donald C. Russell Is a Nominal and/or Formal Party.

Applying the aforementioned proposition to the facts of the case, it is apparent that Plaintiff Donald C. Russell is a mere formal and/or nominal party. As a director of the Plaintiff Standard Paper Box Corporation, he is a fiduciary and as such has a duty to the corporation to act in its best interest. In the performance of this duty he has joined with the corporation as a party Plaintiff in this action. He asserts no right or claim which is fundamentally his own in this cause, but merely asserts the existence of a duty which he thusly performs. He has merely the interest of a fiduciary as to the corporate Plaintiff and such is not an interest in the controversy between the corporate Plaintiff and the Defendants. The only interest that he does have, as the only disinterested director, is in the relationship between the corporate Plaintiff and its board of directors which is the subject matter of the suit. Since all other directors of the Plaintiff corporation are named as Defendants in the cause, the presence of the Plaintiff Russell is convenient to the settlement of all questions in relation to the subject matter and thereby prevent further litigation.

The case of *Overman Wheel Company v. Pope Manufacturing Company,* 46 Fed. 577 (C. C. Conn., 1891), is illustrative of the formal party rule. Two entities, one corporate and one individual having different State citizenships joined as parties plaintiff in an action originally filed in the State Court. The defendant petitioned for

removal of the cause to the Federal Court on the ground of diversity of citizenship, which petition was granted. In the Federal Court the plaintiffs moved the Court to remand the action to the State Court for lack of diversity of citizenship between the individual plaintiff and the defendant. The presence of the individual plaintiff was considered by the Court on page 577 as follows:

> ". . . Albert H. Overman, the other plaintiff, is a citizen of the state of Massachusetts, but it now sufficiently appears in the record that he is simply an agent or attorney of the other plaintiff, and has no personal interest in the controversy. His presence as a plaintiff is of no importance with respect to the defendant's right of removal."

The case of *Sioux City & D. M. Ry. Co. v. Chicago M. & St. P. Ry. Co.,* 27 Fed. 770 (C. C. Ia., 1886), is further illustrative of the formal party rule involving the presence in an action of a party having a duty to perform, wherein the Court said:

> "The allegations of the bill filed in this case do not show that the sheriff and commissioners have any joint interest in the subject of the controversy with the Chicago, Milwaukee & St. Paul Railway Company; but, on the contrary, it appears from the bill that the only connection they have with the matter in dispute is in discharge of the duty imposed upon them by law, and that does not confer upon them any interest in the controversy; and hence it must be held that they are nominal parties only, and the jurisdiction of this court depends upon the citizenship of the real parties to the controversy, to-wit, the railway companies."

It seems clear, therefore, that the Plaintiff Donald C. Russell is a mere formal and/or nominal party plaintiff whose citizenship is not to be considered for purposes of determining jurisdiction in the Federal Court, although his citizenship is not diverse from the citizenship of the individual defendants.

D. Conclusion.

It is believed that the record of this case clearly establishes that Plaintiff Standard Paper Box Corporation is an indispensable party to the cause; that Plaintiff Donald C. Russell is a mere nominal and/or formal party to the cause; that the citizenship of Donald C. Russell should not be considered and should be disregarded with respect to the question of the jurisdiction of the Federal Court as predicated upon diversity; and that the order dismissing the cause should be reversed.

Dated: At Beverly Hills, California, this 17th day of December, 1952.

Respectfully submitted,

J. Robert Maddox,
Attorney for Plaintiff-Appellants.

No. 13548

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD PAPER BOX CORPORATION and DONALD C. RUSSELL,

Plaintiff-Appellants,

vs.

CHARLES RUBLE, SR., CHARLES RUBLE, JR., R. T. MILLER, FRANK W. CLARK, JR., GEORGE P. RICHARDSON and ASSOCIATED PAPER BOX COMPANY,

Defendant-Appellees.

APPELLEES' REPLY BRIEF.

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Defendant-Appellees.

APPELLEES' REPLY BRIEF.

I.

Introduction.

This is a minority stockholder's derivative suit presented in the name of the corporation, Standard Paper Box Corporation, and one stockholder and director, Donald C. Russell. The United States District Court, Honorable Peirson M. Hall, dismissed the complaint for want of jurisdiction. This appeal is from that judgment of Dismissal.

II.
Statement of Jurisdiction.

The complaint (Paragraph I) alleged that Standard Paper Box Corporation (hereinafter referred to as Standard), is a Delaware Corporation doing business in California [Tr. p. 3]; Paragraph III of the complaint [Tr. p. 5] alleged that plaintiff Donald C. Russell "is a resident of the City and County of Los Angeles, State of California"; Paragraph IV of the complaint [Tr. p. 5] alleged that the defendant Associated Paper Box Company (hereinafter called Associated), is a Washington corporation; Paragraph V of the complaint [Tr. p. 5] alleged that the defendants Charles Ruble, Sr., Charles Ruble, Jr., and R. T. Miller "are residents of the County of Los Angeles and of the State of California" (referred to in the complaint as the Ruble family); Paragraph VI of the complaint [Tr. p. 6] referring to the defendants Frank W. Clark, Jr., and George P. Richardson alleged "said defendants are residents of the County of Los Angeles, State of California." Paragraph VII of the complaint [Tr. p. 7] alleged "this court has jurisdiction of the cause by reason of the complete diversity of citizenship of Plaintiffs and Defendants."

There was in fact, according to the allegations of the complaint, *no* complete diversity of citizenship of plaintiff*s* and defendants and the United States District Court had *no* jurisdiction of the alleged cause of action.

III.

Statement of the Pleadings.

In addition to the foregoing allegations of the complaint the following allegations are pertinent:

(a) Paragraph I [Tr. p. 4] alleged that the stock of Standard consisted of 8,254 shares of 5% preferred and 9,486 shares of common.

(b) Paragraph II [Tr. p. 4] alleged that plaintiff, Donald Russell, owned 506 shares of common, his father, John A. Russell, owned 255 shares of common, his mother, Lillian Russell owned 573 shares of common, his brother owned 200 shares of common and the defendants Charles Ruble, Sr., Charles Ruble, Jr., and R. T. Miller owned approximately 6,324 shares of common.

(c) Paragraph V [Tr. p. 5] alleged that defendants Charles Ruble, Sr., Charles Ruble, Jr., and R. T. Miller were and are officers and directors of Standard and that the defendants Frank W. Clark, Jr. and George P. Richardson are directors of Standard. Paragraph III [Tr. p. 5] alleged that Plaintiff Donald C. Russell is a director of Standard and renders legal services to Standard.

(d) Paragraph XIII [Tr. p. 16] alleged that on April 25, 1952, John A. Russell (father of plaintiff Donald C. Russell) filed an action, No. 14042 in the United States District Court, Southern District of California, Central Division, against the "Ruble family" Standard and Associated and that Plaintiffs "at

the proper time will move to consolidate the within action with said civil action." (This is the "other" action referred to in oral argument June 2, 1952.) [Tr. p. 38.]

(e) Paragraph XVI [Tr. p. 18] alleged "that plaintiff Standard is under the domination and control of defendant Ruble Family through a dummy board of directors."

(f) Paragraph XX [Tr. p. 19] alleged "that it has been necessary to bring this action in order to preserve the rights of all of the shareholders of Standard."

(g) Throughout the complaint (except in so far as the paragraphs identifying the parties are concerned) plaintiff Donald C. Russell and plaintiff Standard are referred to collectively in the plural as "plaintiff*s*."

(h) The complaint generally complained of acts of alleged mismanagement by the majority stockholders allegedly in disregard of the rights of minority stockholders and was typical of a complaint by a minority stockholder asserting a derivative action.

Two motions were made in response to this complaint [Tr. p. 23]:

(1) Defendants Charles Ruble, Sr., Charles Ruble, Jr., R. T. Miller, Frank W. Clark, Jr., George P. Richardson and Associated moved to dismiss the complaint for want of jurisdiction.

(2) Standard moved to dismiss the complaint as filed on behalf of Standard and for an order withdrawing the name of Standard as a purported plaintiff on the ground "that said action was filed purporting to name said corporation as plaintiff without its knowledge, authorization or consent."

The United States District Court granted the motion to dismiss for want of jurisdiction stating that this "makes it unnecessary to pass on motion of Standard Paper Box Corporation to dismiss and to withdraw its name as a purported plaintiff." [Tr. p. 33.]

IV.
Issue on Appeal.

The instant case presents the following issue on appeal:

Does the United States District Court have jurisdiction of a minority stockholder's derivative action on the ground of diversity of citizenship where it affirmatively appears on the face of the complaint that the plaintiff minority stockholder and all of the individual defendants are citizens of the State of California?

V.
Summary of Argument.

The United States District Court has no jurisdiction of a minority stockholder's derivative suit on the basis of diversity of citizenship where the plaintiff minority stockholder and all individual defendants are citizens of the State of California.

VI.

Argument.

It should be noted preliminarily that the complaint does not allege the citizenship of *any* of the parties. It alleges only the "residence" of the parties which of course is not sufficient. (See cases collected Note 704, page 541, Section 1332, Title 28, U. S. C. A.) However, the trial court and all parties treated the allegation of "residence" as synonymous with "citizenship."

A.

There Is No Diversity.

The appellant herein seeks to avoid the inevitable conclusion that the United States District Court has no jurisdiction on the basis of diversity of citizenship of a minority stockholder's derivative suit where the plaintiff minority stockholder and all individual defendants are citizens of the same state by adding the name of the corporation Standard, a Delaware corporation, as plaintiff without its knowledge, authorization or consent and then arguing that the plaintiff minority stockholder is not an indispensable but a mere nominal party. It is apparent that but for the illegal naming of Standard as a plaintiff without its knowledge, authorization or consent, plaintiff Donald C. Russell would have been the sole plaintiff in the action. The assertion of Standard that it was named plaintiff without its knowledge, authorization or consent finds suppport in the allegation of the complaint wherein it is alleged "that plaintiff Standard is under the domination and control of defendant Ruble Family through a dummy board of directors." [Par. XVI, Tr. p. 18.]

Appellee regards it as very presumptive, to say the least, for one out of five directors who is a very minor stockholder to file an action in the name of a corporation without the knowledge, authorization or consent of any of the other board members or the officers of the corporation. The proper procedure would have been to join the corporation as a defendant as plaintiff's father John Russell did in Action No. 14042. [Par. XIII, Tr. p. 16.] This is a problem, however, which the trial court considered moot upon its dismissal of the complaint for want of jurisdiction.

We believe that the case of *Tucker v. New Orleans Laundries* (E. D. La., 1949), 90 Fed. Supp. 290, is decisive of this appeal. In the *Tucker* case Mrs. Tucker alleging that she was a minority stockholder of the defendant Crescent City Laundries, Inc., filed a derivative action based on alleged diversity of citizenship against various officers, directors and stockholders of Crescent alleging various acts of wrongdoing in the management of the corporation. Tucker was a citizen of Louisiana; Crescent was a Maine corporation; 45 of the 51 defendants were citizens of Louisiana and moved to dismiss for want of jurisdiction. Plaintiff apparently contended that Crescent, the Maine corporation, was the real and only indispensable plaintiff and should be realigned as plaintiff. The District Court granted the motion to dismiss for want of jurisdiction, saying at page 292:

> "Where as here jurisdiction is founded upon diversity of citizenship it is well settled that there is diversity of citizenship only when all the parties upon one side of the controversy are of different citizenship from all the parties on the other side. This, however, is not determined merely by the title to the

> action. If in any case the caption does not reflect the true relation of the parties to the controversy, they are realigned according to interest and the question whether diversity exists is determined after such realignment. *But in a stockholder's derivative action the corporation whose right is asserted is properly aligned as a defendant where, as is here alleged, it is in antagonistic hands.* Commencing with the leading case of Dodge v. Woolsey, 18 How. 331, 59 U. S. 331, 15 L. Ed. 401, and continuing throughout the years, *the courts have in this class of cases consistently refused to realign the corporate defendant in whose behalf plaintiff sues, as a party plaintiff."* (Emphasis ours.)

In the *Tucker* case plaintiff argued that under Section 1401 of the 1948 Judicial Code (28 U. S. C., Sec. 1401) she could sue in the United States District Court in Louisiana. The United States District Court considered this amendment and determined that it applied to venue only and not jurisdiction.

The *Tucker* case was affirmed on appeal by the United States Circuit Court of Appeals for the Fifth Circuit in 1951 (188 F. 2d 263), and certiorari was denied by the United States Supreme Court on October 8, 1951 (96 L. Ed., Adv. Op. 33). It is interesting to note that in the *Tucker* case plaintiff is referred to in the District Court as "Tucker" only (90 Fed. Supp. 290). In the Fifth Circuit plaintiff is referred to as "Tucker, *et al*" (188 F. 2d 263), but before the United States Supreme Court plaintiff is referred to as "Mrs. Adele V. Hubert Tucker, As a Stockholder, on Behalf of Crescent City Laundries, Inc., Petitioner" (96 L. Ed. Adv. Op. 33).

B.

The Corporation Is Not an Indispensable Party Plaintiff.

Throughout his opening brief appellant asserts that Standard is an indispensable party *plaintiff*. We concede that in a stockholder's derivative action the corporation is an indispensable party but this is a far cry from saying that it is an indispensable party *plaintiff*.

In *Venner v. Great Northern Railway Company* (1907), 209 U. S. 24, 28 S. Ct. 328, 52 L. Ed. 666, appellant, a citizen of New York, filed a minority stockholders derivative action against James J. Hill, a citizen of Minnesota, and the Great Northern Railway Company, a Minnesota corporation, for alleged wrongdoing by Hill. The defendant moved to transfer to the Federal Court for diversity and plaintiff moved to remand to the State court urging that the corporation was the only real plaintiff, that this therefore in essence was an action by a Minnesota corporation against a Minnesota citizen of which only the State court had jurisdiction. The trial court refused to remand. This was affirmed on appeal by the United States Supreme Court which court at page 668 said:

> "Let it be assumed for the purposes of this decision that the court may disregard the arrangement of parties made by the pleader, and align them upon the side where their interest in and attitude to the controversy really place them, and then may determine the jurisdictional question in view of this alignment. (Citations omitted.) If this rule should be applied it would leave the parties here where the

pleader has arranged them. It would doubtless be for the financial interests of the defendant railroad that the plaintiff should prevail. *But that is not enough.* Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, *and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant.* (Citations omitted.) The case of Doctor v. Harrington is precisely in point on this branch of the case, and is conclusive. In that case the plaintiffs, stockholders in a corporation, brought an action in the circuit court against the corporation and Harrington, another stockholder, 'who directed the management of the affairs of the corporation, dictated its policy, and selected its directors.' It was alleged that Harrington fraudulently caused the corporation to make its promissory note without consideration, obtained a judgment on the note, and sold, on execution, for much less than their real value, the assets of the corporation to persons acting for his benefit. On the face of the pleadings there was the necessary diversity of citizenship, but it was insisted that the corporation, because its interests were the same as that of the plaintiff, should be regarded as a plaintiff. The court below so aligned the corporation defendant, and, as that destroyed the diversity of citizenship, dismissed the suit for want of jurisdiction. This court reversed the decree, saying, p. 587: *'The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to*

act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court.' There was therefore in the case at bar the diversity of citizenship which confers jurisdiction." (Emphasis ours.)

C.

Plaintiff Donald C. Russell Is More Than a Mere Nominal Party.

In order to justify his assertion that the United States District Court has jurisdiction appellant asserts that plaintiff Donald C. Russell is a mere nominal party whose citizenship may be disregarded in determining jurisdiction. Appellant relies on two cases, *Overman Wheel Company v. Pope Manufacturing Company,* 46 Fed. 577, and *Sioux City & D. M. Ry. Co. v. Chicago M. & St. P. Ry. Co.,* 27 Fed. 770, neither of which appear to be minority stockholders derivative actions.

We think a case more in point which discloses that Donald C. Russell as a minority stockholder is more than a mere nominal party is the case of *Nogle v. Wyoga Gas & Oil Corporation,* 10 Fed. Supp. 905. In this case plaintiff minority stockholder brought a derivative action against defendant Delaware corporation and certain officers and directors who were citizens of Pennsylvania. The action was filed in the United States District Court, Middle District of Pennsylvania. Plaintiff was a citizen of Pennsylvania. Defendants moved to dismiss for want of jurisdiction. Plaintiff made the same contention as Donald C. Russell in the case at bar, to-wit: that plaintiff was a mere nominal party, the real cause of action

belonged to the Delaware corporation, that plaintiff's residence should conclusively be presumed to be the same as the corporation, and that therefore there was complete diversity. The District Court in dismissing the action for want of jurisdiction said at page 906:

> "The object of the presumption that the stockholders of a corporation are deemed to be citizens of the corporation's domicile is to establish the citizenship of the legal entity for the purpose of jurisdiction in the federal courts. *Such presumption has no relation to the citizenship of individuals as parties to a controversy in their own right. It follows that there is no legal presumption that the individual complainants, who are also stockholders of the defendant corporation, are citizens of the same state as the corporation.*
>
> *Doctor v. Harrington,* 196 U. S. 579, 25 S. Ct. 355, 49 L. Ed. 606;
>
> *Utah-Nevada Co. v. De Lamar* (C. C. A.), 133 F. 113, certiorari denied 199 U. S. 605, 26 S. Ct. 746, 50 L. Ed. 330.
>
> *"The defendant corporation cannot be aligned with the plaintiff, since it appears from the bill that those in control of the corporation are opposed to the object sought to be obtained by the complainants in their suit.* The 'fact that the ultimate interest of a corporate defendant may be the same as that of the complaining stockholders does not require, in arranging the parties to a cause, that such corporation be grouped on the side of the complainants, if it is under a control antagonistic to the complainants and is made to act in a way detrimental to their rights. * * *.' Hughes, Federal Practice, vol. 2, §747;

Kelly v. Mississippi River Coaling Co., *et al.* (C. C.), 175 F. 482; 28 U. S. C. A., §41(1), note 653.

"A federal court is presumed to be without jurisdiction of a suit until the contrary affirmatively appears. To give a federal court jurisdiction on the ground of diversity of citizenship, all parties on one side must be citizens of different states from all persons on the other side. Danks v. Gordon, *et al.* (C. C. A.), 272 F. 821; Osthaus v. Button, *et al.* (C. C. A.), 70 F. (2d) 392; 28 U. S. C. A., §41(1), note 598. The pleadings show that all the plaintiff stockholders and all the defendants except the corporation, R. E. Kearney, and George J. Hartman, are citizens of Pennsylvania." (Emphasis ours.)

In *Doctor v. Harrington* (1905), 196 U. S. 579, 25 S. Ct. 355, 49 L. Ed. 606, we have the converse of appellants argument. Plaintiff, a minority stockholder, citizen of New Jersey brought a derivative action against a New York corporation and individual citizens of New York in the United States Circuit Court, New York, on the basis of diversity of citizenship. Defendants moved to dismiss for lack of diversity asserting that the cause of action was really that of the corporation who should be regarded as plaintiff; hence no diversity. The trial court dismissed the United States Supreme Court reversed, saying at page 609:

"The ninety-fourth rule in equity contemplates that there may be, and provides for, a suit brought by a stockholder in a corporation, founded on rights which may properly be asserted by the corporation. And the decisions of this court establish that such a suit, when between citizens of different states, in-

volves a controversy cognizable in a circuit court of the United States. The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff; but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests and the interests of the corporation may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court.

In Detroit v. Dean, 106 U. S. 537, 27 L. Ed. 300, 1 Sup. Ct. Rep. 500, Dean, who was a citizen of New York and a stockholder in the Mutual Gaslight Company, a Michigan corporation, in order to protect its right and property against the threatened action of a third party, brought suit against the latter and the corporation in the circuit court of the United States for the eastern district of Michigan. This court ordered the bill dismissed, not because Dean and the corporation had identical interests, but because the refusal of the directors of the corporation to sue was collusive. The right of a stockholder to sue a corporation for the protection of his rights was recognized, the condition only being the refusal of the directors to act, which refusal, it is said, must be real, not feigned. Hawes v. Oakland (Hawes v. Contra Costa Water Co.), 104 U. S. 450, 26 L. Ed. 827, was cited, where a like right was decided to exist. See also Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401; Davenport v. Dows, 18 Wall. 626, 21 L. Ed. 938; Memphis v. Dean, 8 Wall. 73, 19 L. Ed. 328; Greenwood v. Union Freight R. Co., 105 U. S. 16, 26 L. Ed. 963; Quincy v. Steel, 120 U. S. 241, 30 L. Ed. 624, 7 Sup. Ct. Rep. 520. *It was said that in Dodge v. Woolsey, that the*

refusal of the directors to sue caused them and Woodsey, who was a stockholder in a corporation of which directors, 'to occupy antagonistic ground in respect to the controversy, which their refusal to sue forced him to take in defense of his rights.'"

In *Grael v. United Electric Co.,* 132 Fed. 252 (cited with approval in *Venner v. Great Northern,* 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666), a New Jersey stockholder brought a minority stockholder's suit against his company, a New Jersey corporation, and a Pennsylvania corporation in the State Courts of New Jersey. The case was transferred to the Federal Court and on motion to remand the Pennsylvania corporation argued that the interest of the New Jersey corporation was identical with that of the New Jersey plaintiff, that the New Jersey corporation should be treated as a plaintiff for purpose of determining the existence of diversity, and since there was thus diversity, the motion to remand should be denied. After an exhaustive review of the authorities, the court granted the motion to remand, saying at page 263:

> "The rule deduced from them is that, in a suit in equity instituted by a stockholder in his own name, but upon a right of action existing in his corporation, *the stockholder's corporation will be aligned with the defendants whenever the officers or persons controlling the corporation are shown to be opposed to the object sought by the complaining stockholder,* and that, when such opposition does not appear, the stockholder's corporation will be aligned with the complainant in the suit."

Plaintiff Donald C. Russell's assertion that he is merely a nominal party plaintiff and the corporation is the real indispensable plaintiff proceeds on the assumption that all

that plaintiff says about alleged wrongdoing by the individual defendants is true but disregards his own allegations [Par. XVI, subd. c; Tr. p. 18] that

> "Standard is under the domination and control of Defendant Ruble Family through a dummy board of directors."

It is apparent from the complaint that the corporation is antagonistic to the claims of Donald C. Russell and the corporation should therefore be aligned as a defendant. The corporation Standard might very properly elect not to sue.

Findley v. Garrett, 109 Cal. App. 2d 166, 240 P. 2d 421.

VII.

Motion to Dismiss Appeal on Behalf of Standard.

The complaint in the trial court was filed in the name of Donald C. Russell and Standard without the knowledge, authorization or consent of Standard. A motion by Standard to dismiss and withdraw its name as plaintiff was not determined by the trial court since it deemed the question moot by reason of its judgment dismissing the action for want of jurisdiction. The appeal herein before this Honorable Court was likewise taken in the name of Standard, without its knowledge, authorization or consent. As soon as this appeal is set down for oral argument, Standard will duly make a motion on that date supported by certified resolution of its Board of Directors to dismiss the appeal in so far as Standard is concerned. We deem it appropriate to now call the

court's attention to the intentions of Standard in this regard because, if, as and when such motion is granted it will make crystal clear the absurd position which Donald C. Russell finds himself in. It will demonstrate that Donald C. Russell is more than a mere nominal party, he is the entire lawsuit. He is as essential to this lawsuit as a shoelace is to a shoe or a belt is to a pair of pants. Without him there would be no lawsuit. If the purported appeal is dismissed on behalf of Standard, the judgment of the trial court dismissing the action as to Standard will be final. There will thus be only one party plaintiff, to-wit, Donald C. Russell, who is a resident of California, the same as all other defendants except Associated.

Conclusion.

It is respectfully submitted that the judgment of the trial court dismissing the complaint for want of jurisdiction should be affirmed.

Respectfully submitted,

WRIGHT, WRIGHT, GREEN & WRIGHT,
LOYD WRIGHT, and
CHARLES A. LORING,

Attorneys for Appellees.

No. 13554

United States Court of Appeals

for the Ninth Circuit.

GROVER C. SCHLAADT, SR., and GARFIELD SCHLAADT,

Appellants,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife; FRED JAHNKE and EMMA JAHNKE, Husband and Wife, and EMIL ZIMMERMAN as the Executor of the Last Will and Testament of JOHN HENRY KUCKS, Deceased,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-5-52

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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Attorneys for Plaintiffs and Appellants.

UNDERWOOD & CAMPBELL,
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Attorneys for Defendants and Appellees.

In the District Court of the United States for the Eastern District of Washington, Northern Division

Civil Action No. 992

GROVER C. SCHLAADT, SR., and GARFIELD SCHLAADT,

Plaintiffs,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife, FRED JAHNKE and EMMA JAHNKE, Husband and Wife, and EMIL ZIMMERMAN as the Executor of the Last Will and Testament of JOHN HENRY KUCKS, Deceased,

Defendants.

COMPLAINT

Plaintiffs allege:

1. At all times herein mentioned plaintiff Grover C. Schlaadt, Sr., was and he is a citizen and resident of the state of Oregon. At all times herein mentioned Garfield Schlaadt was and he is a citizen and resident of the state of California. At all times herein mentioned, all of the defendants herein and each of them were and are citizens and residents of the state of Washington.

2. The amount in controversy herein exceeds, exclusive of interest or costs, the sum of $3,000.

3. Catherina Schlaadt was the mother of the plaintiffs herein. In the month of June, 1944, Cath-

erina Schlaadt was a widow living in the city of Portland, Oregon, in a home of her own close to the home of plaintiff Grover C. Schlaadt, Sr. In the month of June, 1944, John Henry Kucks, a widower, visited Catherina Schlaadt, the mother of these plaintiffs, at her home in Portland and during that visit proposed marriage to her. Catherina Schlaadt having a nice home in Portland, Oregon, was reluctant to leave that home to take up her residence at Davenport, Washington, the home of John Henry Kucks, and as an inducement to Catherina Schlaadt to marry him John Henry Kucks orally solemnly promised Catherina Schlaadt that if she did marry him he would leave all of his property to her two sons, the plaintiffs herein, stating in that behalf that he had no children and no one else to whom he could leave it. Thereafter, having weighed the advantages and benefits to her sons of the promises so made by John Henry Kucks to leave all his property and estate to her two sons, Catherina Schlaadt agreed and promised to marry John Henry Kucks and on August 11, 1944, John Henry Kucks and Catherina Schlaadt were married at Vancouver, Washington.

4. Thereafter, Catherina Schlaadt Kucks was until her death a true and dutiful wife to John Henry Kucks and labored hard to keep their home and to provide for her husband, John Henry Kucks. In addition thereto Catherina Schlaadt Kucks expended substantial sums from her separate estate for furnishings and fixtures in the home of John Henry Kucks.

5. On January 4, 1946, Catherina Schlaadt Kucks died and her husband, John Henry Kucks, probated her estate and succeeded to all of her property rights both in Lincoln County, Washington, and in Multnomah County, Oregon, a large part of which she had owned prior to her marriage to John Henry Kucks.

6. Subsequent to the marriage of John Henry Kucks and Catherina Schlaadt the said John Henry Kucks repeatedly assured Catherina Schlaadt and others that he had made and executed his will naming as the sole beneficiaries of his estate the plaintiffs herein and further naming plaintiff Grover C. Schlaadt, Sr., as the executor therein.

7. Thereafter on August 27, 1949, John Henry Kucks, under the conditions and because of the influences hereinafter set forth, violated his promise and agreement made to his late wife, Catherina Schlaadt Kucks, by executing a new will by which he gave, devised and bequeathed all of his property and estate to the defendants herein, to Emil Zimmerman and Kate Zimmerman, husband and wife, an undivided one-half interest and to Fred Jahnke and Emma Jahnke, husband and wife, an undivided one-half interest, who were not related to him in any way. In said last will said John Henry Kucks did appoint Emil Zimmerman as executor of his last will and directed that the will be probated without the intervention of any court other than is required by the laws of the state of Washington

and likewise directed that his executor be not required to give bond as such.

8. At the time that John Henry Kucks, deceased, made his will of August 27, 1949, said decedent was 86 years of age, physically infirm, failing in memory and easily influenced. For a considerable time prior to August 27, 1949, defendants herein, Emil Zimmerman, Kate Zimmerman, Fred Jahnke and Emma Jahnke, well knowing the physical weaknesses of said John Henry Kucks and his property accumulations, with the intent and desire to secure for themselves the whole of the estate of said decedent, by wiles and artifices of professed friendship and solicitude for his welfare sought to induce said decedent to alter his will in their favor and thereby to breach his contract with his deceased wife, mother of these plaintiffs. By these wiles and artifices said defendants succeeded on August 27, 1949, in inducing John Henry Kucks in his then weakened and infirm condition to revoke his former will in favor of these plaintiffs and to leave the whole of his estate to the said defendants and thereby to breach his said contract with his deceased wife, mother of these plaintiffs, to leave his said estate to these plaintiffs.

9. Thereafter, on July 12, 1951, the said John Henry Kucks died in Lincoln County, Washington. Thereafter, such proceedings were had that on July 17, 1951, the last will of John Henry Kucks executed on August 27, 1949, was duly admitted to probate. Defendant Emil Zimmerman received let-

ters testamentary from the Superior Court of the State of Washington for Lincoln County authorizing him to act as executor of said last will and ever since said date said Emil Zimmerman has been and he is the duly appointed, qualified and acting executor of the Estate of John Henry Kucks, deceased.

10. Thereafter, such further proceedings were had in said estate that an inventory of the real and personal property of said John Henry Kucks was duly filed and property therein listed was appraised as of the value of $74,552.22.

Wherefore plaintiff prays:

1. That the said promise of John Henry Kucks to leave all of his property by his last will to these plaintiffs be specifically performed;

2. That the said defendants, and each of them, be adjudged to convey to these plaintiffs the whole of the estate of John Henry Kucks upon the conclusion of the probate of the Estate of John Henry Kucks, deceased, in the Superior Court of the State of Washington for Lincoln County.

3. That the said defendants, and each of them, be enjoined and restrained from converting any part of said estate to their own use, save only the probate fees of Emil Zimmerman that may be awarded to him by the said Superior Court as and for his services as such executor;

4. That the plaintiffs have such other and further relief as this court may deem just; and

5. That the plaintiffs have and recover their costs of and from defendants.

GRAVES, KIZER & GRAVES,
By /s/ J. W. GREENOUGH,
Attorneys for Plaintiffs.

[Endorsed]: Filed December 21, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants above named and move the court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

2. To dismiss the action on the ground that the court lacks jurisdiction of the matter in controversy.

UNDERWOOD AND
CAMPBELL,
HAMBLEN, GILBERT &
BROOKE,
Attorneys for Defendants.

Service of Copy acknowledged.

[Endorsed]: Filed January 8, 1952.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE AN AMENDED ANSWER

The defendants move the court for leave to file the attached amended answer in the above-entitled action. This motion is made pursuant to Rule 15 of Rules of Civil Procedure and on the records and files herein.

Done in open court June 10, 1952.

UNDERWOOD & CAMPBELL,
HAMBLEN, GILBERT & BROOKE,
/s/ PHILIP S. BROOKE,
Attorneys for Defendants.

Service of Copy acknowledged.

[Endorsed]: Filed June 11, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiffs move that the court grant leave to plaintiffs to amend their complaint by substituting for the original paragraph 6 thereof the following:

> "6. Subsequent to the marriage of Catherina Schlaadt and John Henry Kucks he executed his will dated May 24, 1945, pursuant to and in performance of the agreement above alleged, and after the death of Catherina Schlaadt executed his will dated February 11, 1946, pursuant to and in performance of said agreement. Subsequent to the marriage he repeatedly assured Catherina Schlaadt and others that he had made and executed his will pursuant to and in performance of said agreement."

This motion is made pursuant to Rule 15 of Rules of Civil Procedure and is based upon the records and files herein.

Plaintiffs will bring the above motion on for hearing before the court at the United States Court House in Spokane on June 27, 1952, at 10 o'clock a.m.

Spokane, Washington, June 25, 1952.

GRAVES, KIZER & GRAVES,
/s/ J. W. GREENOUGH,
Attorneys for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 25, 1952.

[Title of District Court and Cause.]

MINUTE ENTRY JUNE 27, 1952, RE MOTION TO FILE AMENDED ANSWER

Present: Honorable Sam M. Driver,
U. S. District Judge.

Now on this 27th day of June, 1952, this matter came on for hearing on Defendant's Motion for leave to file an amended answer, Plaintiff's Motion to strike Affirmative Defense, and Plaintiff's Motion to Amend Complaint. After argument by Mr. Brooke on behalf of defendant and by Mr. Kizer for plaintiff, Motion to Amend Answer Granted, and Plaintiff's Motion to Amend Complaint also Granted.

* * *

Thereupon Court adjourned until Monday, June 30th, 1952, at 10 a.m.

Certified: A True Copy:

[Seal] /s/ STANLEY D. TAYLOR,
Clerk U. S. District Court, Eastern District of Washington.

[Title of District Court and Cause.]

AMENDED ANSWER

Defendants for answer to the complaint of the plaintiffs, admit, deny and allege as follows:

I.

Admit the allegations contained in paragraphs 1 and 2.

II.

Answering paragraph 3, admit that Catherina Schlaadt was the mother of the plaintiffs herein, and during the month of June, 1944, was a widow living in the City of Portland, Oregon. That on August 11, 1944, John Henry Kucks and Catherina Schlaadt were married at Vancouver, Washington; and deny each and every other allegation, matter and thing contained in paragraph 3.

III.

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4, and therefore deny the same.

IV.

Answering paragraph V, admit that on June 4, 1946, Catherina Schlaadt died, and her husband John Henry Kucks succeeded to her property rights in Lincoln County, Washington; and deny the remaining allegations contained in said paragraph.

V.

Answering paragraph VI, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VI, and therefore deny the same.

VI.

Answering paragraph VII, admit that on August 27th, 1949, John Henry Kucks executed a will by

which he gave, devised and bequeathed all of his property and estate to the defendants herein, namely, Emil Zimmerman and Kate Zimmerman, husband and wife, an undivided one-half interest, and Fred Jahnke and Emma Jahnke, husband and wife, an undivided one-half interest, who were not related to him in any way, and appointed Emil Zimmerman as executor of his last will and testament, and directed that the will be probated without the intervention of the court other than as required by the laws of the State of Washington, and likewise directed that his executor be not required to give bond as such; and deny the remaining allegations contained in said paragraph.

VII.

Deny each and every allegation, matter and thing contained in paragraph VIII.

VIII.

Admit the allegations contained in paragraph IX and in paragraph X.

Further answering said complaint and for an affirmative defense thereto, defendants allege that the alleged contract that John Henry Kucks would leave all of his property to her two sons, namely, Grover S. Schlaadt and Garfield Schlaadt, if he would marry the said Catherina Schlaadt, if made, is void and unenforceable under the Statute of Frauds of the State of Washington.

Wherefore, defendants having fully answered the

complaint of the plaintiff pray that said action be dismissed and that they do and will recover their costs and disbursements herein expended.

UNDERWOOD & CAMPBELL,
HAMBLEN, GILBERT &
BROOKE.

/s/ PHILIP S. BROOKE,
Attorneys for Defendants.

[Endorsed]: Filed June 30, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the court sitting without a jury at Spokane, Washington, on June 30, 1952. The plaintiffs appeared in person and by their counsel B. H. Kizer and J. W. Greenough of Graves, Kizer & Graves. Defendants appeared in person and by their counsel Philip S. Brooke of Hamblen, Gilbert & Brooke and Floyd J. Underwood of Underwood & Campbell. Oral testimony and documentary evidence was introduced by the plaintiffs. At the conclusion thereof the defendants moved that the court enter an order dismissing said action with prejudice, challenged the sufficiency of the evidence to sustain any judgment in favor of plaintiffs and also renewed their motion to dismiss on the ground that the complaint failed to state a claim against the defendants upon

which relief could be granted. At the conclusion of argument of counsel the court, having announced its oral decision and being now fully advised in the premises, makes the following

Findings of Fact

1. At all times mentioned in these findings plaintiff Grover C. Schlaadt, Sr., was and is a citizen and resident of the state of Oregon and plaintiff Garfield Schlaadt was and is a citizen and resident of the state of California. At all times in these findings mentioned all of the defendants in this cause were and are citizens and residents of the state of Washington.

2. The amount in controversy in this litigation exceeds, exclusive of interest or costs, the sum of $3,000.

3. Catharina Schlaadt (after August 11, 1944, Catharina Schlaadt Kucks) was the mother of the plaintiffs herein. In the month of June, 1944, Catharina Schlaadt was a widow living in the city of Portland, Oregon. She had been a widow for ten years and lived in a large and well furnished home of her own built by her late husband for them in 1920. Her son Grover C. Schlaadt, Sr., lived on a farm 14 miles away but came into the city each day to work and two or three times each week brought with him his wife to spend the day with Catharina Schlaadt, then picking her up in the evening. In Portland lived her grandson Grover C. Schlaadt, Jr., his wife and Catharina Schlaadt's great grand-

son. In addition, she had a wide circle of friends and was happily circumstanced both as to relationships and as to living conditions.

4. For many years there had been an acquaintanceship or friendship between John Henry Kucks and his wife Ida Kucks, living at Davenport, Washington, and the Schlaadt family as herein described. In the month of June, 1944, John Henry Kucks, having recently become a widower through the death of his wife, visited Catharina Schlaadt at her home in Portland and there orally made her the proposition that if she would marry him he would leave upon his death all of his estate to her two sons Grover C. Schlaadt, Sr., and Garfield Schlaadt. Said proposition was made by him for the purpose of inducing Catharina Schlaadt to marry him. This promise was made by John Henry Kucks in good faith and without intent to defraud or deceive Mrs. Schlaadt.

5. The evidence adduced on behalf of the plaintiffs as to the making of this oral proposition or promise by John Henry Kucks to Catharina Schlaadt that if she would marry him he would leave the whole of his estate to her two sons Grover C. and Garfield Schlaadt is conclusive, definite, certain and beyond legitimate controversy. Further, this testimony on behalf of the plaintiffs finds corroboration in the subsequent conduct of John Henry Kucks in the making of the wills recited in paragraphs 9 and 11 herein.

6. The court finds that this proposition or promise was the special inducement that led this 76 year old woman in her comfortable circumstances to marry John Henry Kucks, then a man of 81 years of age, and that she would not have married him but for such promise. However, while the evidence is silent as to the purposes of John Henry Kucks, it is reasonably inferable that he entered into the marriage with the usual expectations entertained of marriage by a man of his age, hoping to have a wife to make and keep a home for him and to give him her care and companionship.

7. Thereafter, having weighed the advantages and benefits to her sons of the promise so made by John Henry Kucks to leave all of his property and estate to her two sons, and in consideration thereof, Catharina Schlaadt agreed and promised to marry John Henry Kucks and on August 11, 1944, John Henry Kucks and Catharina Schlaadt were married at Vancouver, Washington.

8. Relying on said promise of John Henry Kucks to leave his estate as aforesaid Catharina Schlaadt Kucks removed her personal belongings, including her furniture, dishes, and clothing, from her home at Portland, Oregon, to the home of John Henry Kucks at Davenport, Washington, and thereafter until her death Catharina Schlaadt Kucks resided at his home at Davenport, Washington, and was a dutiful wife to John Henry Kucks.

9. Thereafter on May 24, 1945, John Henry Kucks made and executed his last will by which

he left all of his property and estate to his "beloved wife, Catharina Kucks," and appointed Catharina Kucks to be the executrix of his last will under the terms of a non-intervention will.

10. On January 4, 1946, Catharina Schlaadt Kucks died intestate, leaving as her only heirs at law plaintiffs and a daughter Florence Schlaadt, all issue of a former marriage, and her husband John Henry Kucks probated her estate and succeeded to all of her property rights in the state of Washington.

11. Thereafter on February 11, 1946, the said John Henry Kucks by his last will bequeathed in trust the sum of $500 for Gary Handel (son of George Handel whom he and his wife Ida Kucks had brought up to manhood) with the provision that if he should die prior to reaching 21 years of age then the trustee should pay the amount thereof to the beneficiaries of his residuary estate. All the rest, residue and remainder of his estate by said last will John Henry Kucks gave, devised and bequeathed unto Grover C. Schlaadt an undivided ⅔ interest and unto Garfield Schlaadt an undivided ⅓ interest, stating that the said beneficiaries were the sons of his deceased wife Catharina Kucks. Furthermore, Grover C. Schlaadt, one of the plaintiffs herein, was made executor of said last will under the terms of a non-intervention will under the laws of the state of Washington.

12. Thereafter on October 22, 1946, John Henry Kucks, then being of the age of 84 years, made

another will by which the whole of his estate was divided ⅓ to Garfield Schlaadt, 1/6 to Grover C. Schlaadt, 1/6 to the defendants Fred Jahnke and Emma Jahnke, husband and wife, and ⅓ to defendants Emil Zimmerman and Kate Zimmerman, husband and wife, and further appointed Emil Zimmerman as executor of his estate under the terms of a non-intervention will under the laws of the state of Washington.

13. Thereafter, on March 2, 1948, John Henry Kucks made and executed yet another will by which he bequeathed the balance of any money due him on his death from the sale of his land in Canada, which amounted approximately to $15,000, to George Handel, whom he and his wife had brought up to manhood, and to Jerry Handel, infant son of George Handel, he bequeathed a Canadian liberty bond in the amount of $1,000. All the rest, residue and remainder of his estate John Henry Kucks gave, devised and bequeathed an undivided ½ interest to defendants Fred Jahnke and Emma Jahnke, husband and wife; an undivided ½ interest to Emil Zimmerman and Kate Zimmerman, husband and wife, and appointed Emil Zimmerman to be the executor of his last will under the terms of a non-intervention will under the laws of the state of Washington.

14. Thereafter on August 27, 1949, John Henry Kucks executed his fifth will by which he gave, devised and bequeathed the whole of his estate ½ thereof to defendants Emil Zimmerman and Kate Zimmerman and ½ thereof to defendants

Fred Jahnke and Emma Jahnke. By said will also he appointed Emil Zimmerman to be the executor of his last will under the terms of a non-intervention will under the laws of the state of Washington.

15. Thereafter on July 12, 1951, the said John Henry Kucks died in Lincoln County, Washington. Thereupon such proceedings were had that on July 17, 1951, the last will of John Henry Kucks executed as above recited on August 27, 1949, was duly admitted to probate in the superior court of the state of Washington for Lincoln County. Defendant Emil Zimmerman received letters testamentary from the said court authorizing him to act as executor of said last will and ever since said date defendant Emil Zimmerman has been and is the duly appointed, acting and qualified executor of the estate of John Henry Kucks, deceased.

16. Thereafter such further proceedings were had in said estate that an inventory of the real and personal property of said John Henry Kucks, deceased, was duly filed in the office of the clerk of the said court and property therein listed was duly appraised as of the value of $74,552.22. The major portion of the property so inventoried and appraised consisted of real estate. The balance of approximately $15,000 due from the sale of the land in Canada was not included in said inventory.

From the foregoing findings of fact the court draws its conclusions of law:

Conclusions of Law

I.

That the oral contract entered into by and between Catharina Schlaadt and John Henry Kucks during the month of June, 1944, by the terms of which the said John Henry Kucks agreed to leave his property to the plaintiffs in consideration of the said Catharina Schlaadt marrying him, was void and unenforcible under the statute of frauds of the state of Washington, and that neither the execution of the wills dated May 24th, 1945, and February 11th, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds.

II.

That defendants are entitled to judgment against the plaintiffs dismissing the above-entitled action with prejudice together with their costs of suit.

Dated at Spokane, Washington, this 8th day of August, 1952.

/s/ SAM M. DRIVER,
District Judge.

[Endorsed]: Filed August 8, 1952.

United States District Court, Eastern District of Washington, Northern Division

No. 992

GROVER C. SCHLAADT, SR., and GARFIELD SCHLAADT,

Plaintiffs,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife, FRED JAHNKE and EMMA JAHNKE, Husband and Wife, and EMIL ZLMMERMAN as the Executor of the Last Will and Testament of John Henry Kucks, Deceased,

Defendants.

JUDGMENT

This cause having come on regularly for trial before the Hon. Sam M. Driver sitting without a jury at Spokane, Washington, on the 30th day of June, 1952; plaintiffs appearing in person and by their counsel Ben H. Kizer and J. W. Greenough, of Graves, Kizer & Graves, and defendants appearing in person and by their counsel of record Philip S. Brooke of Hamblen, Gilbert & Brooke, and Floyd J. Underwood of Underwood & Campbell; oral testimony and documentary evidence having been introduced by the plaintiffs and at the conclusion thereof the defendants having moved the court for an order dismissing said action with prejudice and having challenged the sufficiency of

the evidence to sustain any judgment in their favor and also renewed their action to dismiss because the complaint fails to state a claim against the defendants upon which relief could be granted, and at the conclusion of argument of counsel the court having announced its oral decision granting said motions and the court having made its findings of fact and conclusions of law, and being duly advised in the premises; now therefore, upon and because of said findings of fact and conclusions of law,

It is ordered, adjudged and decreed that the above-entitled action be and the same is hereby dismissed with prejudice because of the insufficiency of the evidence to a judgment in favor of the plaintiffs and the defendants do have and recover judgment against the plaintiffs for their costs of suit.

Done in open court this 8th day of August, 1952.

/s/ SAM M. DRIVER,
District Judge.

[Endorsed]: Filed August 8, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is given that Grover C. Schlaadt, Sr., and Garfield Schlaadt, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on August 8, 1952.

Spokane, Washington, August 22, 1952.

/s/ BENJAMIN H. KIZER,
/s/ JOSEPH W. GREENOUGH,
GRAVES, KIZER & GRAVES,
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed August 25, 1952.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That the undersigned, Grover C. Schlaadt, Sr., and Garfield Schlaadt, plaintiffs and appellants in the above-entitled action, as Principals, and Fireman's Fund Indemnity Company, a corporation organized under the laws of the State of California, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto the above-named defendants and appellees, Emil Zimmerman and Kate Zimmerman, husband and wife, Fred Jahnke and Emma Jahnke, husband and wife, and Emil Zimmerman as the Executor of the last will and testament of John Henry Kucks, deceased, in the penal sum of Two Hundred Fifty Dollars ($250.00), lawful money of the United States, for the payment of which well and truly to be made, the said Principals and the said Surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Dated this 22nd day of August, 1952.

Whereas, on the 8th day of August, 1952, the above-entitled court rendered and entered a judgment or decree in the above-entitled cause in favor of the above-named defendants and appellees and against the above-named principals;

And Whereas, the said appellants feeling ag-

grieved by said judgment or decree and desiring to appeal from the same to the United States Court of Appeals for the Ninth Circuit and perfect said appeal by this bond.

Now, Therefore, the condition of the above obligation is such that if the said appellants will pay all costs if the appeal is dismissed or the judgment affirmed or all such costs that the appellate court may award if the judgment is modified not exceeding $250, then this obligation shall be void, otherwise to remain in full force and effect.

/s/ GROVER C. SCHLAADT, SR.,
/s/ GARFIELD SCHLAADT,

By GRAVES, KIZER & GRAVES,
Attorneys for Plaintiffs and Appellants.

[Seal] FIREMAN'S FUND INDEMNITY COMPANY,

By /s/ E. B. MURRAY,
Attorney in Fact.

Countersigned by:

FARMIN, ROTHROCK & PARROTT, INC.,

By /s/ WRAY D. FARMIN,
Resident Agent, Spokane, Washington.

[Endorsed]: Filed August 25, 1952.

United States District Court, Eastern District of Washington, Northern Division

Civil No. 992

GROVER C. SCHLAADT, Sr., and GARFIELD SCHLAADT,

Plaintiffs,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife, FRED JAHNKE and EMMA JAHNKE, Husband and Wife, and EMIL ZIMMERMAN as the Executor of the Last Will and Testament of John Henry Kucks, Deceased,

Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Monday, June 30, 1952, before the Honorable Sam M. Driver, Judge of the above-entitled court, sitting without a jury, the plaintiffs being represented by Ben H. Kizer and J. W. Greenough, of Graves, Kizer & Graves, attorneys at law of Spokane, Washington, the defendants being represented by Floyd J. Underwood, of Underwood & Campbell, attorneys at law of Davenport, Washington, and Philip S. Brooke, of Hamblen, Gilbert & Brooke, attorneys at law, of Spokane, Washington. Whereupon, the following proceedings were had and done, to wit: [1*]

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Greenough: The plaintiffs are ready, your Honor.

Mr. Brooke: The defendants are ready.

The Court: All right. There are some matters that occurred to me here in connection with the arguments that we had last week. I'm not sure that we've made of record sufficiently definite disposition of the various matters that came up at that time. On the motion for leave to amend the answer, I think the record should show and the clerk's minutes should show if they do not do so already, that that motion is granted. The motion for leave to amend the complaint also is granted, then there was a motion, I'm not sure definite disposition was made, a motion to strike the affirmative defense of the answer, and that is denied.

Mr. Greenough: I believe technically it wasn't denied; your Honor just said he wouldn't hear argument on it at that time, but would settle it at the trial.

The Court: Well, I think the disposition of motions should be made before entry upon trial, and I'm denying it with the understanding that the issue raised on the motion is not decided definitely and will be considered at the proper time. Now, another thing that occurred to me, there was some discussion in the pre-trial conference about the matter of the allegation that undue influence had been exercised on the deceased by the defendants or someone in their behalf, and I recall that Mr. Brooke took the position that that was not [2] material, that the material thing was whether or not a contract had

been made, and now, of course, in the present state of the issues, whether or not it is enforceable under the statute of frauds, and I think the pre-trial order showed or there is a statement in the pre-trial order that the primary issue is whether or not a contract was made by John Henry Kucks and Catherina Schlaadt with reference to his making a will in favor of her children.

Now, while I still adhere to that position, I also stated that I would consider as admissible in evidence any evidence that had probative value as bearing on the issue of making the contract and on subsequent reflection it occurs to me that whether or not undue influence was exercised upon Henry Kucks to change his will in favor of these defendants might have a very important probative value on the matter of making the contract, and that is borne out, it seems to me, by the defendants' trial brief in which a case is cited to the effect that—let's see—I haven't the trial brief here; it's on my table in there. On page 4 of your trial brief is a case I wish to refer to, Mr. Brooke, if you have it.

Mr. Brooke: That the execution of the will is some evidence of the making of a contract, and also the making of a subsequent will——

The Court: Yes. The case that was cited was to the effect that where a will is made that would be in accordance with the [3] alleged contract, and then a subsequent will is made which revokes that one and makes a different disposition, that that is some evidence that there wasn't any contract in the first place, and of course we must assume until the con-

trary is shown that people are well-intentioned and that they're honest and honorable and straightforward, and that they intend and endeavor to carry out their contracts, and so it could be argued that, well, Mr. Kucks, it may be assumed, didn't make any such agreement as that, or he wouldn't have so lightly changed it, and of course, the answer to that, or one answer, would be that he wouldn't have if he hadn't been unduly influenced to do so. It seems to me if the question of making a subsequent will has evidentiary value, then the reason why he made it and that he was influenced unduly to make it would have probative value also.

Mr. Brooke: I have no objection to that. I don't know how long plaintiffs will take, but we might have to have a continuance until tomorrow morning to meet that issue.

The Court: Well, it wouldn't be a question of any continuance; I'm here for the duration.

Mr. Brooke: Well, I don't mean a continuance——

The Court: If you have to go over until tomorrow, I have set aside time for it; as a matter of fact this is the only case I have set before the 4th of July, although I hope the case won't last all week; if it runs over until tomorrow that [4] won't inconvenience me in any way. I had this thought, too; I don't know whether you had that in mind or not, but in all probability it seems to me that the plaintiffs' case will disclose all the pertinent facts on the question of whether this contract is enforceable un-

der the statute of frauds, so if that issue is to be determined in your favor, it could be done at the close of the plaintiffs' case. I don't know of anything you could bring in that would alter that situation. It will depend on whether it appears the contract is within the statute of frauds at the conclusion of the case.

Mr. Greenough: I'd like to be heard on the remarks of your Honor and counsel. Your Honor of course recalls that at pre-trial I vigorously defended our position that we were entitled to bring out this matter of undue influence which we claim brought about the revocation of the two early wills which recognized the contract, and the making of later wills which repudiated the contract. Mr. Brooke was vigorously opposed, in fact, more vigorously opposed, because your Honor went down his side of the fence as shown by the pre-trial order. As a consequence, Mr. Kizer and I had a discussion following pre-trial and we have completely abandoned that phase of the case. I'd like your Honor to know we have three, probably four witnesses whom we would call on that phase of the case, and we haven't interviewed them since pre-trial, or made any attempt to talk to them. I know one is not immediately available, and [5] we certainly couldn't get any of them here by tomorrow; if we're in court today, we couldn't begin to agree that we could interview them again and get them here. We have interviewed them, you understand, but get them up here in time to go ahead on that issue tomorrow. If I understand correctly your Honor's suggestion

that we might go ahead on the case as we have prepared it pursuant to the pre-trial order, and then defer the remainder of our case on the issue of the influence if at the conclusion of our case your Honor thinks it's necessary to put it in, I think that would be acceptable to us.

The Court: Well, I'm sorry to have misled in that respect. What I had in mind was that if no contract were made, it wouldn't make any difference whether undue influence was exercised or not; of course we all recognize that as true.

Mr. Greenough: Or if it were within the statute.

The Court: But I think the only thing the pre-trial order recites is that the primary issue is the making of the contract. As I recall, I did state, although I didn't have it specifically in mind, while I thought the primary issue was the making of the contract, but I certainly would let in everything that would have probative bearing on that issue, and both parties must have that in mind. Of course, the question of undue influence would have importance only in case I come to the conclusion after your other evidence is submitted that you haven't proven the making of an oral contract with the degree [6] of proof required. It is an extraordinary degree of proof, or at least most of the cases so hold, and if I come to the conclusion that you haven't established the making of the contract to the degree of proof required, then I think you might reasonably be given an opportunity to bring in the witnesses on undue influence. They're available so we wouldn't have to put it over until after the 4th of July?

Mr. Greenough: Well, if your Honor pleases, they were interviewed some time early in the preparation of the case, a considerable time before the pre-trial order came out. Following the pre-trial, and of course I want to say parenthetically that I read that pre-trial order and still do in the light of what was said at the pre-trial, and I remember Mr. Brooke's statement repeatedly that the only question was whether or not there was a contract made. If there was a contract made, he breached it; no question about it. That was the basis of the argument upon which the pre-trial order was made. Certainly it takes us completely by surprise.

The Court: These cases are a little extraordinary in this respect, there is considerable difficulty in proving whether or not a contract of this type was made, and that difficulty is aggravated by the fact that certain classes of witnesses who would normally be your best witnesses are disqualified under what a friend of mine in Waterville once described as a statute that prohibited having a conversation with a dead man, [7] 1211, I believe it was under the old system, but it is difficult to make proof, so that these matters that ordinarily wouldn't be too important take on more importance in a case of this kind, subsequent conduct of the parties and so on. I think at best it's only relevant in meeting the contention that the making of a subsequent will was evidence that there was no contract.

Mr. Greenough: I think I didn't complete my answer to your last question, I got off into a parenthetic remark; that is, in view of the pre-trial or-

der and the conference, we have made no attempt to interview these people, and where they are I don't know. Some of them are of course resident around Davenport, and there is one at least who is no longer resident there. We knew where she was at one time, but we haven't had our finger on her for a good many months, so we couldn't agree to an arbitrary statement of time for which the continuance should be made. If there is going to be a continuance to round up those witnesses, we'll do it with dispatch, all possible alacrity, but if we're to proceed and leave that issue open we're ready to go.

The Court: What do you say to that?

Mr. Brooke: I certainly wouldn't object to any reasonable continuance.

The Court: Well, all right, proceed, then.

Mr. Greenough: Your Honor, I'd like to pass up to your [8] Honor plaintiffs' trial brief. I have handed a copy of it to counsel for defendants.

The Court: All right. Proceed.

Mr. Greenough: May it please the Court, this action has been three times before you prior to calling it for trial today, once upon defendants' motion to dismiss and to make more definite and certain, second upon a pre-trial conference, and the third time on motion to amend the complaint and the answer, and motion to strike the affirmative defense of the plaintiffs' complaint. I recognize therefore the possibility that your Honor may be so sufficiently aware of the issues involved here that an opening statement isn't necessary. It would simply be a re-

cital of what we expect to prove by the witnesses, and we prefer to let them speak for themselves.

The Court: I don't believe it would be necessary unless you have something that you think should be brought to my attention that hasn't been brought out in the prior proceedings in the case.

Mr. Greenough: I think with what's before your Honor, your Honor is thoroughly conversant with the issues and generally familiar with what the evidence will be, at least on our side. Plaintiff's identification number 10 in the pre-trial order was a copy of the marriage certificate. We have, however, now secured the original certificate of marriage of Henry Kucks and Catherina Schlaadt, and we offer that as an [9] exhibit.

Mr. Brooke: No objection, your Honor.

The Court: I think we should keep the same numbering on those that were produced at the pre-trial conference, and this will be 10, then, and it will be admitted.

Mr. Greenough: The copy is in as 10; this will be a second one; should it be 10-A?

The Court: You may withdraw the copy, and this one will be substituted.

(Whereupon, Plaintiffs' Exhibit No. 10 for identification was admitted in evidence.)

PLAINTIFFS' EXHIBIT No. 10

Certificate of Marriage

State of Washington,
County of Clark—ss.

I Hereby Certify, That on the 11th day of Au-

gust, in the year of our Lord, one thousand nine hundred and forty-four, at Vancouver, in the County and State aforesaid, I, the undersigned, a Justice of the Peace, by authority of a License bearing date the 11th day of August, A.D. 1944, and issued by the County Auditor of Clark County, Washington,

Did Join in Lawful Wedlock

at 2:30 o'clock p.m., Henry Kucks of the County of Lincoln, State of Washington, and Catherina Schlaadt of the County of Multnomah, State of Oregon.

In the presence of:

/s/ GROVER C. SCHLAADT,
/s/ MRS. ARLETHA SCHLAADT,
Witnesses.

/s/ PAUL ELWELL,
Name of Party Performing Marriage;

JUSTICE OF THE PEACE,
Official Station.

/s/ HENRY KUCKS,
Groom.

/s/ CATHARINA SCHLAADT,
Bride.

Note: This Certificate is to be given to contracting parties.

Admitted in evidence June 30, 1952.

Mr. Greenough: The same situation exists with respect to plaintiffs' identification number 4, which was a copy of the last will and testament of John Henry Kucks, dated May 24, 1945.

The Court: Well, suppose we treat that the same way, you produce the original and we'll release the copy.

Mr. Greenough: Very well, and I invite the Court's attention to the fact that with this last will and testament there is the envelope in which it was enclosed when it was taken from the safe deposit box after Mr. Kucks' death.

The Court: Have you examined the envelope, Mr. Brooke?

Mr. Brooke: No.

Mr. Greenough: Mr. Underwood handed it, I think, to one of our clients.

Mr. Brooke: We have no objection. [10]

The Court: It will be admitted, then. Suppose we just clip the envelope on, and we'll call it all one exhibit.

(Whereupon, Plaintiffs' Exhibit No. 4 for identification was admitted in evidence.)

PLAINTIFFS' EXHIBIT No. 4

Last Will and Testament of John Henry Kucks

This Is To Certify that I, John Henry Kucks, of Lincoln County, State of Washington, being of sound and disposing mind and memory and over the age of twenty-one years, considering the uncertainty

of life, do hereby make, publish and declare this as and for my Last Will and Testament, that is to say:

First: I hereby revoke all former wills by me made.

Second: I direct that my body be decently buried with proper regard to my station and condition in life.

Third: I hereby direct that my executrix, hereinafter named, shall pay all my debts as soon as she has sufficient money with which to do the same.

Fourth: I hereby state that I have no children.

Fifth: I hereby give, devise and bequeath all of my property, of every kind and nature, both personal and real, or mixed, possessed by me at the time of my death, to my beloved wife, Catharina Kucks, to be her sole and separate property, forever.

Sixth: I hereby nominate and appoint my wife, Catharina Kucks, the executrix of this my Last Will and Testament, to serve as such without bond and without the intervention of any court.

In Testimony Whereof, I have hereunto set my hand and seal this 24th day of May, 1945.

/s/ JOHN HENRY KUCKS.

This Instrument, consisting of two pages, was on the date hereof by the said John Henry Kucks signed, sealed, published as and declared by him to be his Last Will and Testament in the presence of us, who at his request and in his presence and in the

presence of each other have hereunto subscribed our names as witnesses thereto.

Witness:

/s/ AMY LOUGHBON,
Address: Davenport, Washington.

/s/ LOIS McKEE,
Address: Davenport, Washington.

/s/ FLOYD J. UNDERWOOD,
Address: Davenport, Washington.

Admitted in evidence June 30, 1952.

Mr. Greenough: Plaintiffs' identification number 5 at the pre-trial was a copy of the last will and testament of John Henry Kucks, dated February 11, 1946. That is already in the clerk's possession; I assume it's not necessary to tender another copy of that, your Honor.

The Court: You haven't the original of that one?

Mr. Greenough: No, we do not.

The Court: All right, that will be admitted, then.

(Whereupon, Plaintiffs' Exhibit No. 5 for identification was admitted in evidence.)

PLAINTIFFS' EXHIBIT No. 5

Last Will and Testament of John Henry Kucks

Know All Men By These Presents, That I, John Henry Kucks, of Davenport, Lincoln County, Washington, being of the age of eighty-three years, and

being of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person or persons whomsoever, and being mindful of the uncertainties of life, do hereby make, publish and declare the following to be my Last Will and Testament, hereby revoking all former wills by me made.

First: I direct that all my debts be paid by my executor hereinafter named as soon as he shall have sufficient funds on hand to do the same.

Second: I direct that my body be buried, in a metal vault, in my family plot in the Lutheran Cemetery at Davenport, Washington, and I direct that my executor hereinafter named shall expend not less than $1500.00 for my funeral expenses.

Third: I hereby state that I am a widower, and I have no living children, nor the descendants of any deceased children.

Fourth: I hereby give, devise and bequeath, in trust, to Grover C. Schlaadt, the sum of Five Hundred ($500.00) Dollars for Gary Handel, the same to be paid to him when he becomes twenty-one years of age, together with any interest which may accumulate on the the same, provided however, that in the event the said Gary Handel dies prior to arriving at the age of twenty-one years, I then direct said trustee to pay said money to the beneficiaries named in the residuary clause of this my Last Will and Testament.

Fifth: I hereby give, devise and bequeath unto Grover C. Schlaadt an undivided two-thirds interest and unto Garfield L. Schlaadt an undivided one-

third interest in and to all the rest, residue and remainder of my property of every kind, nature and description, wheresoever the same may be situated. I hereby state that the said Grover C. Schlaadt and Garfield L. Schlaadt are the sons of my deceased wife, Catharina Kucks.

Sixth: I further direct that each beneficiary under this, my Last Will and Testament, shall pay all inheritance taxes due from him to the State of Washington by reason of said bequest.

Seventh: I hereby nominate and appoint Grover C. Schlaadt the executor of this my Last Will and Testament, and direct that this Will be probated without the intervention of any court other than is required by the laws of the State of Washington. I further direct that my executor be not required to give bond as such.

In Witness Whereof, I have hereunto set my hand and seal, and published and declared this to be my Last Will and Testament on this 11th day of February, 1946.

. . . . . .

This Instrument, consisting of two pages, including this one, was on the date hereof by the said John Henry Kucks signed, sealed, published as, and declared by him to be his Last Will and Testament in the presence of us, who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereto.

Witness:

.....

Address: Davenport, Washington.

.....

Address: Davenport, Washington.

.....

Address: Davenport, Washington.

Admitted in evidence June 30, 1952.

Mr. Greenough: May I invite your attention to the fact that the preamble of that will recites that John Henry Kucks at the time of its execution was of the age of 83 years. That may become pertinent during the trial.

The Court: What date was that?

Mr. Greenough: February 11, 1946. It shows a recital of his age as 83. Plaintiff's identification number 6 in the pre-trial order is a copy of the last will and testament of John Henry Kucks dated October 22, 1946. I will offer that in evidence.

The Court: It will be admitted. That's the same document [11] that's been marked already.

(Whereupon, Plaintiffs' Exhibit No. 6 for identification was admitted in evidence.)

PLAINTIFFS' EXHIBIT No. 6

Last Will and Testament of John Henry Kucks

Know All Men By These Presents, That I, John Henry Kucks, of Davenport, Lincoln County, Washington, being of the age of eighty-four years, and being of sound and disposing mind and memory and

not acting under duress, menace, fraud or the undue influence of any person or persons whomsoever, and being mindful of the uncertainties of life, do hereby make, publish and declare the following to be my Last Will and Testament, hereby revoking all former wills by me made.

First: I direct that all my debts be paid by my executor hereinafter named as soon as he shall have sufficient funds on hand to do the same.

Second: I direct that my body be buried, in a metal vault, in my family plot in the Lutheran Cemetery at Davenport, Washington, and I direct that my executor hereinafter named shall expend not less than $1500.00 for my funeral expenses.

Third: I hereby state that I am a widower, and I have no living children, nor the descendants of any deceased children.

Fourth: I hereby give, devise and bequeath the property of my estate as follows, to wit:

To Garfield L. Schlaadt, son of my deceased wife, Catharina Kucks, an undivided one-third interest;

To Grover C. Schlaadt, son of my deceased wife, Catharina Kucks, an undivided one-sixth interest;

To Fred Jahnke and Emma Jahnke, husband and wife, or the survivor, of Davenport, Washington, an undivided one-sixth interest;

To Emil Zimmerman and Kate Zimmerman, husband and wife, or the survivor, of Davenport, Washington, an undivided one-third interest, together with all the rest, residue and remainder;

Fifth: I further direct that each beneficiary

under this, my Last Will and Testament, shall pay all inheritance taxes due from him by reason of said bequest.

Sixth: I hereby nominate and appoint Emil Zimmerman the executor of this my Last Will and Testament, and direct that this Will be probated without the intervention of any court other than is required by the laws of the State of Washington. I further direct that my executor be not required to give bond as such.

In Witness Whereof, I have hereunto set my hand and seal and published and declared this to be my Last Will and Testament on this 22nd day of October, 1946.

.....

This Instrument, consisting of two pages, including this one, was on the date hereof by the said John Henry Kucks signed, sealed, published as, and declared by him to be his Last Will and Testament in the presence of us, who at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

Witness:

.....

Address: Davenport, Washington.

.....

Address: Davenport, Washington.

.....

Address: Davenport, Washington.

Admitted in evidence June 30, 1952.

Mr. Greenough: And your Honor will observe that this recital states Mr. Kucks was at the time of its execution 84 years of age.

The Court: That was a year later, was it?

Mr. Greenough: Yes, the will was a year later—well, about ten months later, and it shows one year more of age.

The Court: October 22, 1946?

Mr. Greenough: 84 then.

The Court: All right.

Mr. Greenough: Plaintiffs' identification number 7 in the pre-trial order is a copy of the last will and testament of John Henry Kucks dated March 2, 1948. We offer that in evidence.

The Court: Is that number 7?

Mr. Greenough: Yes.

The Court: It will be admitted.

(Whereupon, Plaintiffs' Exhibit No. 7 for identification was admitted in evidence.)

PLAINTIFFS' EXHIBIT No. 7

Last Will and Testament of John Henry Kucks

Know All Men By These Presents, That I, John Henry Kucks, of Davenport, Lincoln County, Washington, being of legal age, and being of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person or persons whomsoever, and being mindful of the uncertainties of life, do hereby make, publish and declare the following to be my Last Will and Testament, hereby revoking all former Wills by me made.

First: I direct that all my debts be paid by my executor hereinafter named as soon as he shall have sufficient funds in hand to do the same.

Second: I direct that my body be buried, in a metal vault, in my family plot in the Lutheran Cemetery at Davenport, Washington, and I direct that my executor hereinafter named shall expend not less than $1,500.00 for my funeral expenses.

Third: I hereby state that I am a widower, and I have no living children, nor the descendants of any deceased children.

Fourth: I hereby give, devise and bequeath the property of my estate as follows, to wit:

To George Handel of Seattle, Washington, the boy whom I raised, I give the balance of any money due me on my death from the sale of my land in Canada, which I have at this time sold on contract.

To Jerry Handel, son of George Handel, I give a Canadian Liberty Bond, which I now own, in the amount of $1,000.00.

All the rest, residue and remainder of my property, of every kind, nature and description, I hereby give, devise and bequeath as follows:

To Emil Zimmerman and Kate Zimmerman, husband and wife, or the survivor, of Davenport, Washington, an undivided one-half interest, and

To Fred Jahnke and Emma Jahnke, husband and wife, or the survivor, of Davenport, Washington, an undivided one-half interest.

Fifth: I further direct that each beneficiary un-

der this, my Last Will and Testament, shall pay all inheritance taxes due from him by reason of said bequest.

Sixth: I hereby nominate and appoint Emil Zimmerman the executor of this my Last Will and Testament, and direct that this Will be probated without the intervention of any court other than is required by the laws of the State of Washington. I further direct that my executor be not required to give bond as such.

In Witness Whereof, I have hereunto set my hand and seal, and published and declared this to be my Last Will and Testament on this 2nd day of March, 1948.

.....

This Instrument, consisting of two pages, including this one, was on the date hereof by the said John Henry Kucks signed, sealed, published as, and declared by him to be his Last Will and Testament in the presence of us, who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereto.

Witness:

FLOYD J. UNDERWOOD,
Address: Davenport, Washington.

AMY LAUGHBON,
Address: Davenport, Washington.

.....
Address: Davenport, Washington.

Admitted in evidence June 30, 1952.

Mr. Greenough: In the pre-trial order, plaintiffs' identification number 8 is a copy of the last will and testament of John Henry Kucks, dated August 27, 1949. Plaintiffs offer that identification as an exhibit. [12]

The Court: That will be admitted.

The Clerk: I don't have 8 here.

The Court: Wait just a moment, here. Oh, I can understand Miss Hardin's difficulty; there's a note in the pre-trial order that says identifications 8, 9 and 10 are reserved, being documents which are to be supplied later, so we do not have them.

Mr. Greenough: Well, now, then, I'm going to hand up to Miss Hardin, the clerk, your Honor, plaintiffs' identification number 8, which is a copy of the last will and testament of John Henry Kucks, dated August 27, 1949.

The Court: All right.

Mr. Greenough: Your Honor will observe that this is a copy certified by the clerk of the Superior Court of the State of Washington, that being the will which was in effect at the time of Mr. Kucks' death and which was probated in the Lincoln County Superior Court:

The Court: Well, let Mr. Brooke examine it.

Mr. Brooke: No objection.

The Court: It will be admitted.

(Whereupon, Plaintiffs' Exhibit No. 8 for identification was admitted in evidence.)

PLAINTIFFS' EXHIBIT No. 8

Last Will and Testament of John Henry Kucks

No. 5355

Know All Men By These Presents, That I, John Henry Kucks, of Davenport, Lincoln County, Washington, being of legal age, and being of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person or persons whomsoever, and being mindful of the uncertainties of life, do hereby make, publish and declare the following to be my Last Will and Testament, hereby revoking all former Wills by me made.

First: I direct that all my debts be paid by my executor hereinafter named as soon as he shall have sufficient funds in hand to do the same.

Second: I direct that my body be buried, in a metal vault, in my family plot in the Lutheran Cemetery at Davenport, Washington, and I direct that my executor hereinafter named shall expend not less than $1,500.00 for my funeral expenses.

Third: I hereby state that I am a widower, and I have no living children, nor the descendants of any deceased children.

Fourth: I hereby give, devise and bequeath the property of my estate as follows, to wit:

To Emil Zimmerman and Kate Zimmerman, husband and wife, or the survivor, of Davenport, Washington, an undivided one-half interest, and

To Fred Jahnke and Emma Jahnke, husband and wife, or the survivor, of Davenport, Washington, an undivided one-half interest.

Fifth: I further direct that each beneficiary under this, my Last Will and Testament, shall pay all inheritance taxes due from him by reason of said bequest.

Sixth: I hereby nominate and appoint Emil Zimmerman the executor of this my Last Will and Testament, and direct that this Will be probated without the intervention of any court other than is required by the laws of the State of Washington. I further direct that my executor be not required to give bond as such.

In Witness Whereof, I have hereunto set my hand and seal, and published and declared this to be my Last Will and Testament on this 27th day of August, 1949.

JOHN HENRY KUCKS.

This Instrument, consisting of two pages, including this one, was on the date hereof by the said John Henry Kucks signed, sealed, published as, and declared by him to be his Last Will and Testament in the presence of us, who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereto.

Witness:

W. L. CAMPBELL,
Address: Davenport, Wash.

FLOYD UNDERWOOD,
Address: Davenport, Wash.

In the Superior Court of the State of Washington
for Lincoln County

No. 5355

In the Matter of the Estate of
JOHN HENRY KUCKS, Deceased.

CLERK'S CERTIFICATE OF TRUE COPY

State of Washington,
County of Lincoln—ss.

I, Margaret Scott, County Clerk and Clerk of the Superior Court of the State of Washington, for Lincoln County, do hereby certify that the above and foregoing is a true and correct copy of the Last Will and Testament in the above-entitled cause, as the same appears of record and on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the said Superior Court this 1st day of September, 1951.

[Seal] MARGARET SCOTT,
Clerk,

By /s/ SARA CLINTON,
Deputy.

Admitted in evidence June 30, 1952.

Mr. Greenough: Plaintiffs' identification number 9 was a copy of the marriage license. We don't see any materiality in that, since we have the certificate, so we're not offering it, [13] your Honor.

The Court: Very well.

GROVER C. SCHLAADT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Greenough:

Q. Will you state your full name, Mr. Schlaadt?

A. Grover Cleveland Schlaadt.

Mr. Greenough: And I think I may make this suggestion, your Honor, to court and counsel; there are a good many Schlaadts on our side of the case, including a senior and a junior. If there is no objection from the witnesses themselves or from the court or counsel, it might be convenient to refer to some of these people by their first names instead of Mr. Schlaadt, or their full name, and I may do that, I may refer to Grover as Grover Senior, and his son, who will testify, as Grover Junior.

Q. Where do you reside, Mr. Schlaadt?

A. Portland, Oregon.

The Court: This is Mr. Grover Schlaadt Senior, I assume?

Mr. Greenough: This is Mr. Grover Schlaadt Senior, your Honor.

The Court: All right, go ahead.

(Testimony of Grover C. Schlaadt.)

Q. Do you live in the city of Portland?

A. I do. [14]

Q. Proper, or nearby?

A. In the city proper.

Q. Do you live in a residence or on a farm?

A. I live in a residence.

Q. Now, how long have you lived in Portland, Mr. Schlaadt? A. Since 1912.

Q. How old are you, Mr. Schlaadt?

A. 61 this month.

Q. And are you married? A. I am.

Q. And what is your wife's name?

A. Arletha M.

Q. She is present in court, is she not?

A. She is.

Q. Mr. Schlaadt, we will be concerned a good deal in this action with dates in 1944. Were you a resident of Portland at that time?

A. I was.

Q. Did you then reside in the city limits, in the residence in which you now reside?

A. Not then.

Q. Where did you reside in 1944?

A. I lived on a farm just on the outskirts of Portland.

Q. About how far out of Portland?

A. Fourteen miles. [15]

Q. And were you then married?

A. I was.

Q. To Arletha? A. That's right.

Q. What relative are you of Catherina Schlaadt?

(Testimony of Grover C. Schlaadt.)

A. She is my mother.

Q. She later married Henry Kucks and became Mrs. Catherina Kucks? A. That's right.

Q. Do you have any children, Mr. Schlaadt?

A. I have two.

Q. Daughters, or sons? A. Sons.

Q. What are their names?

A. There's Grover Junior, and William R.

Q. Are they in the courtroom today?

A. Well, Grover is here.

Q. Grover, Junior, is here? A. Yes.

Q. Is your other son living? A. Yes, sir.

Q. Where is he, Mr. Schlaadt?

A. He's in the Roseburg Hospital.

Q. The Roseburg Veterans Hospital by virtue of what circumstance, Mr. Schlaadt? [16]

A. He was wounded.

Q. Well, he was wounded in the second World War, was he? A. Yes.

Q. And he's been in that hospital practically almost the entire time since then, hasn't he? You can just answer yes or no to that.

A. Not all the time. We take him home, and have to take him back.

Q. Mr. Schlaadt, are you employed in Portland now? A. No.

Q. Were you employed in 1944? A. Yes.

Q. Where did your mother Catherina reside in 1944?

A. She lived on View Point avenue, in Portland.

Q. And what was her age in 1944?

(Testimony of Grover C. Schlaadt.)

A. I think about 76, I believe, something like that.

Q. She was a widow at that time?

A. She was.

The Court: What was that date in 1944, you say?

Mr. Greenough: I'm just speaking of 1944 generally.

The Court: I see; she was 76 then.

Q. How long had your mother been a widow at that time, that is, in 1944 how long had she been a widow? A. About ten years.

Q. Had your mother been married more than once at that time? [17] A. No.

Q. Your father was deceased, was he, at that time? A. Yes.

Q. Now, you've given us the address at which she resided in Portland, Mr. Schlaadt. Did she own that residence? A. She did.

Q. Just give the Court a brief description of the residence as to size.

A. It was a large eight room house; it was a nice house, well furnished.

Q. How long had she lived there in that house?

A. They built the house about 1920.

Q. And she had lived there continuously until 1944? A. That's right.

Q. And did your mother during those years and particularly in 1944 have friends in the neighborhood and in Portland generally?

A. She had lots of friends in the neighborhood, and used to go to these coffee klotches, they called

(Testimony of Grover C. Schlaadt.)

them, a German bunch used to get together; she went out there quite often.

Q. So far as you observed, or so far as anything your mother said to you, was she contented and happy in her surroundings there in Portland?

A. She was.

Q. Did your mother own property in Portland other than the [18] house which you've described?

A. There was two lots on the same house there, a smaller house there.

Q. You mean two houses on the same lot?

A. That's right.

Q. The other house was smaller?

A. Yes, a four room house.

Q. Did she rent that? A. She did.

Q. Now, in 1944, where did you work in Portland, Mr. Schlaadt?

A. I worked for the Iron Fireman machine shop.

Q. And where is that situated with reference to the home in which your mother lived?

A. It's about a mile north on the same street, only a different name, it's Front Street, and up where they are it's View Point. There's a hill there, and after you go over the hill it's called Front Street. It angles to the river.

Q. Did you go past or at least pass near your mother's house en route from your farm approximately fourteen miles out of Portland to your employment at the Iron Fireman machine shop?

A. It was on the way, and within a block of there all the time, and then sometimes I'd stop there

(Testimony of Grover C. Schlaadt.)

and take the wife in, two or three times a week. [19]

Q. When you say you stopped to take the wife in two or three times a week, you mean your wife would drive in from the farm, and you'd drop her off at your mother's house?

A. That's right, I left her off there, and they used to go to shop, and I don't know just where they went.

The Court: Your place was out about fourteen miles?

A. Yes, we were west of there, and I'd come in straight on the road.

Q. It didn't involve any detour?

A. She used to come down to the bank, it was about a block walk. If I had time I'd make the loop and take her up there, and if I was late she'd walk.

The Court: What was the address of your mother's place?

A. 5004 Southwest View Point Terrace.

The Court: That's on the west side, isn't it?

A. That's on the west side. You come in from Beaverton onto Slaverton Road, and then right down to Front Street.

Q. On these occasions when your wife came in with you and you left her at your mother's home, how long would your wife stay there?

A. Until I picked her up evenings after work.

Q. You'd stop on your way home from work and pick her up? A. That's right.

Q. How often did you say, on the average, that your wife went [20] in on these daily visits?

(Testimony of Grover C. Schlaadt.)

A. She went nearly every other day, and sometimes we'd go both Saturday and Sunday.

Q. But every other day during the work week itself, too? A. Yes, that's right.

Q. Now, Mr. Schlaadt, do you recall a day in June, 1944, when, returning from your work and stopping at your mother's house to pick up your wife who had spent the day there, you found Henry Kucks there? Now, just answer that question yes or no. A. Yes.

Q. Do you remember that occasion?

A. I do.

Q. What was the date of that as nearly as you can recall it, Mr. Schlaadt?

A. I didn't pay much attention. It was the latter part of June.

Q. Of what year? A. Oh, 1944.

Q. Now, on that particular day had you left your wife there in the morning on your way to work?

A. I did.

Q. Now, on that particular morning, and I'm referring to this morning in the latter part of June, 1944, Mr. Schlaadt, had you gone into your mother's house when you [21] left your wife in the morning?

A. No, I never went in mornings, I always just left her off and went down to work.

Q. Now, did you go into your mother's house on that evening when you came to pick up your wife?

A. I sure did.

Q. Who was present when you went into the house?

(Testimony of Grover C. Schlaadt.)

A. My mother and my wife and Mr. Henry Kucks.

Q. You had known Mr. Kucks previously, had you not? A. I had known Kucks since 1904.

Q. Was there a conversation—and don't tell me what it was—I'm just asking you if there was conversation on that occasion between you and Mr. Kucks? A. There was conversation, yes.

Q. Was there conversation between you and your mother? A. There was.

Q. And I take it, then, that generally the four of you who were present had a conversation between you all generally? A. That we did.

Q. Now, what did your mother do and say on that occasion, Mr. Schlaadt?

Mr. Brooke: Just a moment. I wish to object to any statements made. Under section 1211 any statements made in the presence of Henry Kucks are barred, as well as any statements that Kucks made himself, so this would [22] be a statement made in his presence which comes under the statute. This man can't testify as to any statements made in his presence.

Mr. Greenough: Your Honor, I don't want to argue the matter at the moment, but I simply want to state to your Honor our theory. It's going to crop up continually through the case, as your Honor can anticipate. It is our theory that statements made by Mrs. Schlaadt, later Mrs. Catherina Kucks, to any of the witnesses, which indicate her state of mind or her motive for the marriage that later took

(Testimony of Grover C. Schlaadt.)

place, is admissible notwithstanding the hearsay rule, because that's not within the coverage of the hearsay rule, and also notwithstanding section 1211.

The Court: Well, of course that would be a different question if it were out of the presence of John Henry Kucks, but where he is present, there's always necessarily an implication that he has assented to what has been said in his presence, particularly if it's against his interest, and I would have a right to assume if she said, for instance, told her son "Mr. Kucks and I have decided to get married if he will devise all his property to you boys" and Kucks didn't say anything, that would be just the same as a conversation with Kucks, because I'd have to assume Kucks assented to it. While I haven't any authorities in mind, I don't know whether it's been passed on, [23] it seems to me it would come within the spirit of the statute.

Mr. Greenough: Permit me, your Honor please, to withdraw the question, at least at this time in the trial.

The Court: Yes.

Q. Do you know how long Mr. Kucks stayed in your mother's home on that occasion, on that visit, Mr. Schlaadt?

A. Just a few days the first time.

Q. Did your mother later go to visit Mr. Kucks at Davenport, Washington? A. She did.

Q. How long did she stay on that occasion?

A. Gone about ten days.

Q. Did you or your wife receive any communi-

(Testimony of Grover C. Schlaadt.)

cation from her, sent by her while she was at Davenport? A. My wife received a postcard.

Q. Did you see it? A. I saw it.

Q. What did it say?

Mr. Brooke: Just a moment; I object to that, your Honor. It would be a self-serving declaration, and hearsay.

The Court: Well, it's not the best evidence, if the postcard is available. That's the first thing [24] that occurs to me.

Mr. Greenough: Well, if your Honor pleases, it isn't important. All the testimony in response to this question would be is that she gave the date of her expected arrival at home, and asked Mrs. Grover Schlaadt, Sr., to meet her at her home. It's purely preliminary.

The Court: Yes, all right.

Mr. Greenough: That is, when I say at her home, I mean at Catherina's home.

The Court: Well, we have in the record that they received a postcard. Do you desire more than that at this time?

Mr. Greenough: No, that's all that's necessary.

Q. Now, I don't expect you to remember the date of your mother's return to Portland, Mr. Schlaadt, but you are aware of the fact that she did return from Davenport, Washington, to Portland?

A. That's right.

Q. Did you take your wife to your mother's home on the morning of that day?

A. I took her there.

(Testimony of Grover C. Schlaadt.)

Q. Did your wife have a key which would admit her to your mother's home?

A. Yes, we had a key.

Q. And that evening en route home from work did you stop at [25] your mother's house to get your wife? A. I did.

Q. Who was present at that time?

A. Mr. Kucks, my mother, and my wife.

Q. Was Mr. Kucks there at that time? This is after your mother's return from Davenport.

A. When he come down, after her return?

Q. Your mother went to Davenport about ten days? A. Yes.

Q. And she then returned to Portland?

A. Yes.

Q. And your wife was there at her house the day she returned?

A. I took her to work, and she come there while I was at the job.

Q. Yes, but that evening after you got off the job you stopped there at her house? A. Yes.

Q. And your wife was there with her?

A. With my mother.

Q. And was Henry there at that time?

A. No, not at that time.

Q. I thought you were confused on that. Just the three of you, you and your wife and your mother? A. Yes.

Q. Now, what did your mother do and say on that occasion? [26]

(Testimony of Grover C. Schlaadt.)

Mr. Brooke: Just a minute; I object to that.

The Court: On what ground?

Mr. Brooke: On the ground that it's hearsay, any conversation had which was not in the presence of Henry Kucks or any of his representatives; self-serving declaration, also. It's a conversation he had with his mother.

Mr. Greenough: Well, I'll withdraw the question.

The Court: I beg your pardon?

Mr. Greenough: What's that?

The Court: What did you start to say?

Mr. Greenough: I'll withdraw the question at this time.

The Court: Very well.

Mr. Greenough: Of course, it may be necessary after some examination of Mr. Grover Schlaadt, Sr., to take him from the stand and later put him back on the stand.

The Court: Well, you may do that, yes.

Q. Was Henry Kucks later married to your mother? A. He was.

Q. Where did the marriage occur?

A. In Vancouver, Washington.

Q. Did he come to Portland just prior to the wedding?

A. He come to Portland I think on the 7th of August.

Q. Of what year? [27] A. 1944.

Q. 1944? A. 1944.

Q. And where were they married?

A. Married at Vancouver, a justice of the peace.

(Testimony of Grover C. Schlaadt.)

Q. Vancouver, Washington?

A. Vancouver, Washington.

Q. And who, if you know, went with them to get their marriage license?

A. My wife went with them to get the license.

Q. Who, so far as you know, was present at the time of the wedding?

A. My wife was present, and I was present, and mother and Mr. Kucks, and the officers of the court there. I don't know how many there were.

Q. Now, was there that evening a wedding dinner at your mother's home? A. There was.

Q. Do you recall who was present at that time, at that dinner?

A. My mother was there, Mr. Kucks was there, my son was there——

Q. Which son? A. My son Grover.

Q. Junior?

A. Junior; and his wife was there. [28]

Q. His wife's name is Neva?

A. Neva; my wife was there, and I was there.

Q. Sometime subsequent to that, and while Mr. Kucks and your mother were still in Portland, did your son Grover, Jr., and his wife have them over for dinner? A. They did.

Q. Were you present there at that dinner?

A. Yes.

Q. And was your wife? A. Yes.

Q. Now then, Mr. Kucks and your mother eventually returned to his home at Davenport, Washington? A. They did.

(Testimony of Grover C. Schlaadt.)

Q. How long did they stay in Portland after their marriage before they did return to Davenport?

A. I'd say probably five, six, seven days. They was packing her belongings.

Q. When you say her belongings, do you mean furniture and clothing?

A. Furniture and clothing, and some dishes she wanted to take along, keepsakes and the likes of that.

Q. When she moved to Vancouver with her new husband did your mother take the furniture and equipment from the house she had occupied all this time in Portland?

A. She took it on the lower floor. [29]

The Court: You said to Vancouver. You meant Davenport?

Mr. Greenough: Yes. I mis-spoke myself.

A. Yes, she took the furniture from the lower floor.

Q. Do you know whether that furniture was used in Mr. Kucks' home in Davenport?

A. It was.

Q. You saw it there on later occasions?

A. I did.

Q. And was it there at the time of your mother's death? A. It was.

Q. Did your mother make any other preparations by way of providing furniture or anything of that sort for Mr. Kucks' house prior to the time she left Portland and went to Davenport with him?

A. She went down and got a new rug.

(Testimony of Grover C. Schlaadt.)

Q. Now, subsequent to the marriage of your mother with Mr. Kucks, did you and your wife visit them at Davenport?

A. We visited them the next year, in 1945, on Labor Day.

Q. Now, I think earlier in your testimony, Mr. Schlaadt, you mentioned that you had known Henry Kucks since 1904; is that right?

A. That's right.

Q. How did you become acquainted with him?

A. He went to this fair in St. Louis, and on the way back he [30] stopped with my folks in Helena, Montana, and I met him there.

Q. And since that time have you seen him occasionally? A. I have.

Q. Prior to your mother's death did you receive word of her illness?

A. We did. It was on Christmas Eve we got a telegram, in 1945.

Q. What Christmas Eve was that?

A. 1945.

Q. And did you go to Davenport?

A. At Davenport, from Davenport.

Q. Yes. Did you go to Davenport?

A. My son brought my wife and I up.

Q. Grover Junior drove you and your wife up there? A. Yes, sir.

Q. Did his wife Neva accompany you?

A. No.

Q. How long did you stay there, then, on that trip? A. Stayed there until the first of April.

(Testimony of Grover C. Schlaadt.)

Q. Of 1946? A. Yes.

Q. And your mother died when?

A. January 4.

Q. January 4, 1946? [31] A. Yes, sir.

Q. Just a little over a week, then, after you arrived there?

A. I think about eleven days, I think it was.

Mr. Greenough: You may examine, counsel, with the understanding that we may recall Mr. Grover Schlaadt, Sr., subsequently if necessary.

The Court: Very well; it's time for the mid-morning recess. Perhaps that will give you time to confer, Mr. Brooke. We'll recess for ten minutes.

(Short recess.)

Mr. Brooke: No cross-examination, your Honor.

(Whereupon, there being no further questions, the witness was excused.)

ARLETHA M. SCHLAADT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Greenough:

Q. Where do you reside Mrs. Schlaadt?

A. Portland, Oregon.

Q. You're the wife of Grover Schlaadt, Sr.?

A. I am.

Q. Who was the next preceding witness on the witness stand? A. Yes, sir.

(Testimony of Arletha M. Schlaadt.)

Q. How long have you been married to Mr. Schlaadt? A. Forty years.

Q. Is that your only marriage? [32]

A. Yes.

Q. And has it been his only marriage?

A. Yes.

Q. You heard your husband's testimony concerning the extent of your family, two sons?

A. Yes.

Q. That's correct, is it? A. That's right.

Q. Incidentally, your son Grover Schlaadt, Jr., and his wife Neva Schlaadt, who are present in the courtroom, do they have any children?

A. They have one son.

Q. How old is he? A. Seventeen.

Q. And where does he reside?

A. Portland, Oregon.

Q. With his parents? A. Yes.

Q. Your other son has no children?

A. No, he never married.

Q. Now, to save time, Mrs. Schlaadt, I'm also going to ask you if the testimony your husband gave concerning the place of your residence and the place of his mother's residence and the place of his employment in Portland is correct? [33]

A. That's right, yes.

Q. You heard that testimony, did you, and that's all the fact? A. Yes, that's all right.

Q. You were acquainted with your husband's mother, Catherina? A. Yes.

Q. Was she a widow? A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. When did she become a widow, Mrs. Schlaadt, approximately?

A. I believe it was about the first part of February in '37.

Q. And had she been married more than once so far as you know?

A. Well, the second time was Mr. Kucks.

Q. What was her age in 1944? A. 76.

Q. I am using 1944, because as you know, events during that year are important in this case.

A. Yes.

Q. Where did Catherina live in 1944?

A. 5004 Southwest View Point Terrace, Portland, Oregon.

Q. And did she own that residence?

A. She did.

Q. Did she own any other property in Portland?

A. Yes, she had a small house next to the big house.

Q. Was it on the same lot?

A. On the same lot. [34]

Q. What use was made of the small house?

A. It was rented.

Q. And did she occupy the large home?

A. Yes.

Q. Describe that home briefly to us, the larger home, the one occupied by her.

A. Well, there was about four rooms and bath upstairs, and about four rooms downstairs, the living and dining rooms were together, and the bath.

Q. Was there a bath downstairs? A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. Two baths, and was it a comfortable home as to furnishings? A. Very nice home.

Q. And how long did she live there?

A. Well, let's see, that home was built about 1920, I believe it was.

Q. It was built while her husband was alive?

A. Yes.

Q. And she had lived there continuously?

A. Yes.

Q. Were you acquainted with friends and acquaintances that Catherina had in Portland?

A. I was.

Q. Did she have many of them?

A. Yes, she did. [35]

Q. Was she active socially in gatherings among her friends back and forth?

A. Well, she used to go around with a bunch there, all German people, and they had their little club together.

Q. Well, not only their club affiliations, but did they visit back and forth a good deal as folks of that age do very often? A. They did, yes.

Q. From what you observed of Catherina and from statements she has from time to time made to you, do you draw the conclusion that she was contented and happy in her surroundings there in Portland? A. She was.

Q. Now, did you on occasion visit Catherina while your husband was at work?

A. Yes, I used to come in two, sometimes three times a week.

(Testimony of Arletha M. Schlaadt.)

Q. How would you get to her home?

A. I rode in with Grover, and he let me off close to her place.

Q. Was her home on his way from your house to his employment?

A. Yes, fourteen miles we lived out from her place, and he worked about a mile down from her home, north.

Q. And her home was on the route between your home and his employment? A. Yes. [36]

Q. Now, do you recall an occasion when, going into your husband's mother's home on one of these visits, you found Henry Kucks there? Just answer that yes or no. A. I did, yes.

Q. You recall that? A. Yes.

Q. Now, give us the date of that occasion as nearly as you can fix it in your recollection.

A. Well, I don't know whether it was the middle or a little later in June. I don't know the exact date.

Q. Will you tell us what year it was, Mrs. Schlaadt? A. 1944.

Q. Now, was Mr. Kucks in your mother's home when you went in there that morning, or did he appear later that day?

A. He was there when I went in.

Q. Who else was there besides him?

A. Mother was there.

Q. Just the three of you were present, then, after your arrival? A. That's right.

Q. Did your husband go into your mother's

(Testimony of Arletha M. Schlaadt.)

home with you on that morning? A. No.

Q. Now, Mrs. Schlaadt, did you have conversation with Catherina and also with Henry during that day? [37] A. I did.

Q. Speaking now of this day in June, 1944, tell us what occurred and what was said when you arrived there and after your arrival there.

A. Well, I went in and saw Henry there, and I was kind of surprised, and we talked a few minutes, and then I told him we were very sorry to hear about Ida passing away.

Q. Now, Ida was who?

A. Ida was his first wife.

Q. And she had died?

A. She had died in January of that year.

Q. All right, continue.

A. And then I forget just what—oh, he was talking about her a few minutes, you know, about her sickness and how it happened, one thing and another, and then pretty soon, why, he said to me, "Well, now, I suppose you're wondering why I'm up here." Well, he says, "I came up to make a proposition with your mother. I asked her to marry me, and I told her if she would, I would leave all my property to Grover and Garfield, as I have no one to leave it to," and then she said "I told Henry he'd have to give me a little time to think it over; you know, I have a pretty nice home here, Henry," and he says, "Kate, I know you have; I have a nice home in Davenport, too."

(Testimony of Arletha M. Schlaadt.)

Q. Now, was that the sum and substance of that conversation [38] on that day, or was there further discussion?

A. And then she told him, "I'll go up to Davenport"——

Mr. Brooke: Now, just a moment; your Honor, I'm going to object to any statements that Mrs. Schlaadt may have made. She can testify to any statements made by the deceased; as I understand, the wife of a party in interest is not barred, but it isn't my understanding that she can testify as to statements Mrs. Schlaadt may have made, that they would be self-serving declarations and hearsay.

Mr. Greenough: Not hearsay if Mr. Kucks was present.

Mr. Brooke: Well, he's deceased. Under the rule, she can testify as to any statements he might have made, any contract.

Mr. Greenough: Under Section 1211 this witness is not an interested party.

The Court: As I understand it, I tried to make an examination of that, and if the community would benefit from the contract which is alleged, then the wife is barred, but if the community does not benefit, if it would be a separate estate of the husband, then the wife is competent, and as I understand it, that is the situation here under Oregon law, which I suppose would govern. I am not passing on the question whether if this witness started to relate a conversation she had with Mrs. Schlaadt, [39] Catherina Schlaadt, afterward Catherina Kucks, out of the presence of Henry Kucks, that would be a different

(Testimony of Arletha M. Schlaadt.)

question, but here I think if she's competent to testify to what he said, she's also competent to testify to the other side of the conversation with him. For instance, take an example; suppose she said Mrs. Schlaadt made a statement to him and he nodded his head; certainly you'd have to take that to tell what he did say, or what was the subject of the conversation. I'll overrule the objection.

(Pending question and partial answer read by the reporter.)

The Court: Of course, this is apparent, but I'll assume in this line of interrogation unless you indicate to the contrary, that all this conversation with Mrs. Schlaadt was in the presence of Mr. Kucks.

Mr. Greenough: She has indicated the affirmative on this.

The Court: Yes.

Q. Now, go ahead and finish that answer.

A. She said "I'll tell you what I'll do, Henry; I'll go up to Davenport and look your place over, then I'll give you my answer," and so she did.

Q. Well, did he respond to that statement in any way?

A. Well, he seemed to be pleased about it; he said that was all right, Kate. [40]

Mr. Brooke: I object to that as not responsive.

Q. Don't say what he seemed to do. If he said anything, tell us what he said.

A. He said, "That's all right, Kate."

Q. Well, now, did these conversations between

(Testimony of Arletha M. Schlaadt.)

the three of you to which you have just testified, Mrs. Schlaadt, did they occur rather soon after your arrival at Catherina's home that morning?

A. Yes, shortly after.

Q. And you were there with Henry and Catherina, then, for the balance of the day until your husband called for you after he completed his work?

A. That's right.

Q. Now, were there further discussions with the three of you present concerning this subject of Mr. Kucks' as he put it "proposition" to Catherina? Was that subject brought up later in the day?

A. Oh, different times we'd talk about it, that he thought they would get along very nicely, and she was living in that big house alone, it would be a companion for both of them, but we didn't talk a whole lot about him.

Q. Now, have you in what you've told us about the conversations, have you covered substantially, Mrs. Schlaadt, the tenor of the conversations during the day you were there this particular day? [41]

A. Well, she said she was going to Davenport, and then about when she came back——

Q. No, I'm just talking about——

A. Well, there wasn't much. We just kind of talked about different things there, not much more was said about the proposal.

Q. Did he say where he was going after he left Portland?

A. Yes, he said, "As long as I'm up here, Kate,

(Testimony of Arletha M. Schlaadt.)

I think I'll go down and see George," he was stationed down at Gold Beach; he says, "He has a new wife, and I would like to see how they will treat me. I may be gone two or three days or a week."

Q. Explain to Judge Driver who George is.

A. George is the boy that they raised.

Q. That who raised?

A. Mrs. Kucks and Mr. Kucks.

Q. He had taken a boy in as an orphan and had raised him, but they had never adopted him?

A. Never adopted him.

Q. And the boy later went out on his own?

A. Well, he was in the Coast Guard at that time.

Q. And George's last name was——

A. Handel.

Q. H-a-n-d-e-l?

A. I don't know just how it is. I think that's the way it was. [42]

Q. It's mentioned in one of the wills, if your Honor pleases. Now then, did your husband pick you up that day to take you home?

A. That evening, yes.

Q. When he came to pick you up did he come into the house? A. Yes, he did.

Q. And who was then present after your husband came into the house?

A. Mother and Mr. Kucks and myself.

Q. Was there conversation after your husband's arrival between him and your mother and Mr. Kucks? Just answer yes or no.

A. Yes, there was.

(Testimony of Arletha M. Schlaadt.)

Q. Now, after your husband's arrival in the latter part of the day to pick you up and take you home, what did your mother say in the presence of yourself and your husband and of Henry Kucks?

A. Well, he told him, told Grover——

Q. I'm speaking of what did your mother say? I mean Catherina, Grover's mother; what did she say when you and Grover and Henry were all there together that evening?

A. Well, she asked Grover what he thought of the proposition.

Q. Well, first did she tell him the proposition?

A. Well, yes, she did; Henry did.

Q. Just give us her words as nearly as you [43] can. A. Henry told him.

Q. All right, what did Henry say to Grover?

A. Well, he said the same thing to Grover as he did to me; "I came up here to make a proposition with your mother, Grover, and I asked her to marry me, said if she would I would leave all my property to you and Garfield; I have no one to leave it to."

Q. What was said then by your mother, or anything further by Henry?

A. Well, she didn't say much at that time, but then a little later she asked him "Well, what do you think about that, Grover?" and Grover said "That's up to you, you've known Henry so long, and that's up to you to decide," so then she told him the same as she'd told me, that she'd go to Davenport and look this place over.

Q. You say she then told him she'd go to Davenport and look things over? A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. Now, was there any further conversation before you and Grover left to go to your home that evening, as to this general proposition of marriage, or have you covered it?

A. I've just about covered it, because he didn't get to stay very long, he had to hurry home on account of being on the farm, we had cows and chickens and things to attend to, and we didn't get to stay too long. [44]

Q. Now then, did Catherina then go to Davenport, later? A. She did.

Q. About how long after this occasion in June when this meeting at her house with Henry Kucks had occurred?

A. Well, when I saw her again she said Henry had been back——

Mr. Brooke: Well, now, just a moment; I'm going to object to that.

Q. All right, I'm withdrawing it. I'm asking you how long after this day when you found Henry Kucks at your mother's house, how many days, approximately, after that was it that Catherina went up to Davenport? I'm not asking for any conversation.

A. Well, after he came back, he was gone about a week, and then when he came back she waited about a week or a little better before she went up there; I don't know just how long.

Q. Did she and he go up there together?

A. No, they did not.

(Testimony of Arletha M. Schlaadt.)

Q. But she went up about a week later?

A. Yes.

Q. How long did she stay on that trip?

A. She was gone ten days.

Q. Now, while she was there did you receive a postcard from her? A. Yes. [45]

Q. What was the substance of the postcard?

A. Well, she told me the day she would be back, and she'd like to have me at her home.

Q. To meet her?

A. To be there, yes, when she came in.

Q. Now, did you go there on that day?

A. I was there.

Q. Did you have a key by which to gain admittance to her home? A. Yes.

Q. Did she arrive home on that day as planned?

A. Yes, she did.

Q. And when she arrived were you at her home?

A. I was at her home when she came in.

Q. Was anyone present other than you and her?

A. Just her and I.

Q. What did she do and say at that time when she came in?

Mr. Brooke: Well, just a moment. I object to that on the grounds it is hearsay and a self-serving declaration.

The Court: I presume this same question will probably come up again and again in this case, as to whether conversations which people had with Catherina Schlaadt Kucks are admissible. It would be hearsay if she were living. Now, is there an ex-

(Testimony of Arletha M. Schlaadt.)

ception to the [46] hearsay rule because she is dead and not available as a witness? That's the question, isn't it?

(Argument by counsel.)

The Court: I'll sustain the objection. Proceed.

(Further argument by counsel.)

The Court: Now, I think my ruling will be, after certainly mature consideration of this question, which is a troublesome one, will be that I'll overrule the objection but it's understood, of course, that evidence of this kind is admitted not as evidence of facts that may have been recited or asserted by Mrs. Schlaadt in these conversations, but purely and solely for the purpose of showing her state of mind at the time the assertions were made by her, and it will be understood, of course, and the record will show that the ruling of the Court is over the objection of the defendants here.

(Pending question read by the Court Reporter.)

Q. (By Mr. Greenough): Did you hear the question, what did Catherina do and say at that time? We have the time when you were at her home waiting for her to return from this ten day or so visit to Davenport. Now, do you have the question and the time in mind? A. Yes.

Q. You may proceed to answer the question.

Mr. Brooke: May it be understood our objection [47] goes to all this line of testimony?

(Testimony of Arletha M. Schlaadt.)

The Court: Yes, the record may show your objection goes to all this line of testimony by this witness or anyone else without repeating the objection each time.

A. Well, when she came in she was all smiles, and she held her hand out to me and showed me a ring.

Q. Now, you say a ring; it was on her left hand, on her right finger, and it looked like an engagement ring?

A. No, it was on her left hand.

Q. I say, it was on the finger upon which a woman usually wears an engagement ring?

A. Yes.

Q. Go ahead.

A. And I said, "Well, I know what your answer is," and I said, "Where and when are you and Henry going to be married?" and she said, "Henry wants to get married at Vancouver, Washington." Shall I go on?

Q. Just continue with the conversation.

A. She said, "I would like to have you and Grover go with us to be a witness for us," and she said, "He'll be here about the 7th of August, and we'll go over about the 8th, and I would like to have you go with us to get the license," and she said, "We have to wait three days before we can be married," and then she said she wanted to go uptown and pick out some linoleum. [48]

Q. Pick out what?

(Testimony of Arletha M. Schlaadt.)

A. She took Henry's measurements of his floor, and said, "I want to get a rug, because he has linoleum on his floor." She said, "His house is dirty, but I can clean it up, and with my furniture I can make it look nice," so then I went uptown with her a little later and we picked out a rug.

Q. Was there any other conversation on that occasion? Did you stay with her the balance of the day, then, until your husband picked you up?

A. Yes.

Q. What time did she arrive from Davenport?

A. I think it was between 10:30 and 11. She came in on that morning train from Spokane.

Q. And you stayed with her the balance of the day? A. Yes.

Q. Was there any further conversation as to her agreement or decision to marry Mr. Kucks?

A. Yes, she said, "I think Henry is a man of his word, and I think that he will stick by my boys," that he said that he would turn his property over to them, and she said, "Henry spoke about being Grover was a farmer, that he would like for Grover to have the Davenport farm, the land."

Q. Well, now, when you say that—this comes as rather a surprise to me, your Honor—when you say she said she [49] would like to have Grover have the Davenport farm——

A. Henry said that.

Q. Oh, she said to you that Henry had said to her——

A. Yes. I didn't know whether that was——

(Testimony of Arletha M. Schlaadt.)

Mr. Greenough: We're willing to have that stricken.

The Court: I think that should be stricken and the court disregard the statement as to what Henry said.

Mr. Greenough: Yes, it's purely hearsay.

The Court: That's what I had in mind.

Mr. Brooke: Well, I don't quite understand that ruling, your Honor. She's testifying to what Mrs. Schlaadt told her when she came back from Davenport, and she's relating what she found out and what Henry told her. Now, after an hour of argument——

Mr. Greenough: If you want to leave it in we're perfectly willing to leave it in.

The Court: Of course, I can't tell in advance what a witness is going to say, and insofar as it indicates a state of mind of Mrs. Schlaadt that might have material bearing on the issues I'll admit it and regard it, but otherwise I'll not consider it for any purpose. Now, the thought I had in mind was when she says Mrs. Schlaadt says something Mr. Kucks said to her, I think what she said about Mr. Kucks saying to her is clearly not competent, and I'll strike that and disregard it. [50]

Mr. Greenough: Your Honor, may I retract my offer to agree that it be stricken? I can see that on a certain theory of law it might be admissible if it's treated as evidencing Mrs. Catherina Schlaadt's state of mind, especially if counsel objects to anything being withdrawn.

(Testimony of Arletha M. Schlaadt.)

Mr. Brooke: If I understand the question correctly she said Mrs. Schlaadt said Henry told her he wanted Grover to have the Davenport farm. I object to having that stricken.

Mr. Greenough: Well, we'd like to have it in.

The Court: Well, all right.

Mr. Greenough: I take it that it's in, your Honor?

The Court: Yes. We have to draw some very fine distinctions, but without being too artificial about it, I will regard that as evidence of what Mrs. Schlaadt was thinking, but not evidence that Mr. Kucks made the statement.

Mr. Greenough: That's right.

Q. (By Mr. Greenough): Now, following that up, Mrs. Schlaadt, did Catherina say anything to you on that same occasion as to what land Mr. Kucks told her he wanted Garfield to have?

A. Yes, she said, "Henry would like to let Garfield have the Canada property."

Q. Was that land in Canada? **[51]**

A. Yes.

Q. Now, what you've testified as to the conversation between you and Catherina on this occasion when she returned from Davenport, does that fairly cover the conversation you had that day, I mean not every word, but generally the subject on this topic? A. Yes.

Q. When did you go home, then, to your own home, from that meeting with Catherina?

(Testimony of Arletha M. Schlaadt.)

A. That same day, Grover came down to get me after work.

Q. That same evening? A. Yes.

Q. And did Grover come into the house on that occasion? A. Yes.

Q. And was there conversation between you and Grover and Catherina that evening when he came to take you home?

A. Yes, she told him the same as she told me.

Q. Now, you mean substantially the same remarks—— A. So he——

Q. Just a minute, let me finish my question before you start to answer, please; when you say "she told Grover the same thing she told me," you mean substantially the same utterances that you have testified here she made to you during the course of that day? A. Yes. [52]

Q. And did she show Grover her engagement ring? A. Yes.

Q. Now, subsequent to that day when you met Grover's mother on her return from Davenport, when did you next see Mr. Henry Kucks?

A. I didn't see him any more until he came in on the morning of the 8th.

Q. The 8th of what?

A. Of August, 1944.

Q. And did you see him then?

A. Yes, we went over to Vancouver to get the license; I went with them.

Q. When you say we went, you mean Catherina and Henry and you? A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. Went to Vancouver, Washington, and got the marriage license? A. Yes.

Q. And you served as a witness at that time?

A. Well, yes.

Q. Or did they need a witness?

A. They didn't really need one, but they wanted me along.

Q. Now, when the wedding occurred were you present? A. Yes.

Q. Where did that wedding occur?

A. In the courthouse at Vancouver, Washington.

Q. And who performed the service? [53]

A. Some judge.

Q. You don't remember his name, but was he a judge, or a minister, or what?

A. No, he was a judge; justice of the peace, I think.

Q. A justice of the peace. Who was present at that time? A. Just Grover and myself.

Q. And Catherina and Henry? A. Yes.

Q. Now, incidentally, did you all four drive over to Vancouver, Washington, together?

A. Yes.

Q. And did you return together?

A. We did.

Q. By automobile, I suppose? A. Yes.

Q. Was there any conversation during that trip over or back about any arrangement as to disposition of the property? A. No.

Q. Now, was there a wedding dinner that evening? A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. Where did that occur?

A. At mother's home.

Q. At Catherina's home? A. Yes.

Q. Who was present at that time, Mrs. [54] Schlaadt?

A. Well, there was my son and his wife, Grover and I——

Q. Well, when you say your son and his wife, you mean Grover, Junior? A. Yes.

Q. And Neva, and Grover, Senior?

A. Yes, and myself.

Q. And then the married couple? A. Yes.

Q. Subsequent to the marriage, then, I assume that Catherina and Henry went to Davenport to his home? A. Yes.

Q. About how long after the marriage?

A. Well, it was about a week or maybe a little better. They were packing up, crating her furniture and packing some dishes.

Q. What were they packing up, Mrs. Schlaadt?

A. Yes.

Q. I say, what were they packing up?

A. Oh, their dishes and clothes, and they had the furniture, they were fixing the furniture up, wrapping things around.

Q. Furniture and dishes—— A. Yes.

Q. Please, just a minute until I finish my question, Mrs. Schlaadt. You're jumping the gun on me all the time. Furniture and wishes from [55] where? A. From View Point, Portland.

Q. View Point, Portland. Well, you mean from Catherina's home? A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. Her furniture and her dishes?

A. Her furniture and her dishes.

Q. Now, did they take those to Davenport?

A. Yes, sir.

Q. Did you and your husband visit Catherina and Henry at Davenport at any time, then, subsequent to their marriage? A. In 1945 we did.

Q. When in 1945, if you recall?

A. Well, we went up there a couple of days before Labor Day, and we were there over Labor Day.

Q. Now, during your stay on that Labor Day visit in 1945 did Henry *Schlaadt* make any statement to you as to his disposition of his property? Now, you may answer that yes or no.

A. Well, what year did you say?

Q. This Labor Day visit in 1945. During that visit of you and your husband to Davenport did Mr. Henry Schlaadt—I mean Henry Kucks, make any statement to you or have any conversation with you on the subject of his disposition of his property upon his death? You may answer that simply yes or no. [56] A. Well, yes.

Q. All right. Now, what did he say? In the first place, where were you when he made the statement?

A. We was in his home, and he said, "I want to take you and Grover out to see my land, because—" he says, "that's what I want Grover to have."

Q. Well, did you go out to see the land?

A. We did, we went out to see his land.

Q. Who went out to see it?

A. Just Grover and I and mother and Henry.

(Testimony of Arletha M. Schlaadt.)

Q. When you say mother, you mean Catherina?

A. Yes.

Q. And where was that land situated, Mrs. Schlaadt?

A. About six miles, I think it is, out of Davenport.

Q. Six miles away from where he resided?

A. Yes. I don't know, it's kind of southwest, or something.

Q. In other words, Mr. Kucks did not reside on his farm? A. No, he had a home in town.

Q. Did he operate the farm at that time?

A. No, I believe he had it rented out.

Q. Did he make any comments to you or to your husband in your presence as to the quality of the farm or any features of the farm?

A. Yes, he was showing Grover about different parts of it would be the best, what to put in. I didn't pay a whole [57] lot of attention to that part of it myself, but I heard him talk to Grover about it.

Q. If you don't recall what the conversation was, just say so. A. No.

Q. Now, did you receive any word prior to Catherina's death as to her illness?

A. Yes, during Christmas.

Q. What Christmas? A. Christmas Eve.

Q. Christmas Eve, and of what year?

A. 1946.

The Court: Wasn't that 1945?

(Testimony of Arletha M. Schlaadt.)

A. 1945; Yes, pardon me.

The Court: It's contrary to what she testified before.

Q. And what was that, a telegram?

A. Yes, it was.

Q. From whom?

A. I believe Mr. Zimmerman sent it, or Mr. Jahnke, I don't know which sent that; either one of them.

Q. And did you go up there following the receipt of that word?

A. We left right away and drove all night.

Q. Who went?

A. My two sons, and Grover, and myself. [58]

Q. Your two sons? A. Yes.

Q. That is Grover, Junior, and who?

A. William.

Q. That's the war veteran? A. Yes.

Q. And your husband Grover, and yourself?

A. And my son Grover, yes.

Q. And then you were there at the time Catherina died, then? A. Yes.

Q. And how long after Catherina's death did you remain in Davenport?

A. We stayed there until the first of April.

Q. Now, during your visit on that occasion, that is, during Catherina's last illness and death, did Henry Kucks say anything in your presence to you or anyone else present as to what action he had taken or intended to take with respect to his prop-

(Testimony of Arletha M. Schlaadt.)

erty disposition upon his death? You may answer that yes or no.

A. No, I don't remember anything at that time, but I know a little later——

Q. I can't hear you.

A. I know a little later he talked, after Mother passed away.

Q. Well, that's what I'm asking.

A. He went down to make a will. [59]

Q. I'm asking you on this occasion when you were up there for Catherina's last illness, and she died, and you stayed there until the first of April—— A. Yes.

Q. Now, during that time that you were in Davenport did Henry Kucks make any statement to you or to anyone else in your presence which you overheard as to——

A. Grover and myself were there.

Q. All right, what did he say?

A. And he said, "I'm going down and make a will out today," so they went down, and when he came back, they didn't get back until toward evening, and he said, "Well, I made a will out today, and I want Grover to have the Davenport farm, and Garfield to have the Canada farm," and he said, "That will make a good living."

Q. I don't get that last.

A. He said, "That will be a good income for Grover, but don't ever sell the farm, Grover, the land," he always called it the land, "don't ever sell the Davenport land, Grover."

(Testimony of Arletha M. Schlaadt.)

Q. How long had you known Henry Kucks? When did you meet him, in other words?

A. '27.

Q. 1927? A. Yes.

Q. And you had seen him intermittently from that time up until [60] the time of his death?

A. Yes; he had been out to the farm two or three times to see us.

Q. He visited you and Grover?

A. Yes, he did, he and Ida both.

Q. He and his first wife? A. Yes.

Mr. Greenough: You may examine.

Cross-Examination

By Mr. Brooke:

Q. Mrs. Schlaadt, do you speak German?

A. No, I don't.

Q. Did Mr. Kucks speak German?

A. Well, I guess he did. He never talked it in my presence. They 'most always talked English.

Q. Did your mother speak German?

A. Yes, she did.

Q. Did they ever carry on a conversation in your presence in German? A. No.

Q. Well, then, I understood you to say that the proposition was that if your step-mother would marry Henry, he would leave his property to Grover and Garfield? A. Yes.

Q. Is that the entire converastion?

A. Well, I don't know exactly. He said something about, [61] started talking about land, there.

(Testimony of Arletha M. Schlaadt.)

He said, "I would like to have Grover, because Grover is a good farmer."

Q. I'm talking about the first time down there in Portland when this matter first came up in your home, or her home, rather. A. Yes.

Q. What was the entire conversation on that occasion?

A. Oh, he said, "Well, I came down to make a proposition with your mother here. I asked her to marry me, and I told her that if she would, I would leave all my property to the boys, Grover and Garfield."

Q. Did he say how he would divide it between the two boys?

A. Well, not right at that time.

Q. He didn't say? A. No.

Q. And your mother also had a daughter, didn't she? A. Yes.

Q. Any mention made of her during any of these conversations? A. No.

Q. Now then, the next time this agreement came up was after Mrs. Schlaadt had passed away and when you were living at Davenport and he went down to make his will, is that right?

A. That's right.

Q. Do you remember when that was, what month?

A. Yes, it was in February, about the 11th or 12th. [62]

Q. And at that time he told you he was leaving the Davenport land to Grover, and the Canada land

(Testimony of Arletha M. Schlaadt.)

to Garfield, is that right? A. That's right.

Q. Now, as I understand it, those were the only two conversations you ever had concerning this proposition with Henry Kucks? A. Yes.

Q. And when you went to the courthouse, all of you in the automobile, there was no discussion of this matter at all? A. No.

Q. Did he talk generally to people about his business affairs, do you know?

A. Well, not that I know of.

Q. He didn't make a practice of doing that, did he? A. Not that I know of.

Q. And what was his physical and mental condition when you first met him?

A. Oh, all right.

Q. He was rather a vigorous man for his age at that time? A. Yes.

Q. And mentally alert?

A. Well, he seemed to be.

Q. And that was in 1944?

A. That's right. [63]

Q. And what was the difference in age between Mr. Kucks and your mother when they were married?

A. Well, she would have been 77 in November. That would make her 76 then, of course.

Q. And he was about 81? A. Yes.

Q. About four years difference in age?

A. That's right.

Q. And what was your mother's state of health at that time?

A. She was all right, she was feeling good.

(Testimony of Arletha M. Schlaadt.)

Q. In other words, neither one of them were suffering from any infirmities that you could observe? A. No.

Q. Now, where did you live after your step-mother died?

A. We were living in her home on View Point Terrace.

Q. Well, I meant when you were at Davenport.

A. We stayed at Henry's home.

Mr. Greenough: Did you say step-mother?

Mr. Brooke: I meant mother-in-law.

The Court: I think it's understood when you say mother, you mean mother-in-law.

A. Yes. We always called her mother; I did.

Q. You went up for the funeral?

A. Yes. Well, yes, we went up there from the time that we got the telegram she was very sick, and I stayed right [64] through until the first of April.

Q. And you didn't return to Portland in the meantime? A. No.

Q. Now, where did you live up until that period of April 1, 1946?

A. We were living in Portland.

Q. No——

A. Oh, we were staying in Henry's home with him.

Q. And were you and Grover looking after him at that time? A. Yes.

Q. And what was his condition?

A. It was all right.

(Testimony of Arletha M. Schlaadt.)

Q. And wasn't it the understanding that you were to stay there and continue to look after him?

A. No.

Q. Didn't you have that understanding with Henry Kucks? A. No, I did not.

The Court: I'm not sure I understood, when was it that Catherina Kucks died?

A. On January 4.

The Court: And then how long was it you stayed with Mr. Kucks after that?

A. Until the first of April, when he came up to our home.

The Court: You and your husband stayed there, and then you both went to Portland? [65]

A. Yes, all three of us.

The Court: On this occasion when you saw the ring on Catherina Schlaadt's finger, how long was that after she had got back from Davenport?

A. Well, that was the first day that she got back, that she showed me the ring.

The Court: All right, go ahead.

Q. (By Mr. Brooke): Now, what was Henry's physical condition after your mother-in-law passed away?

Mr. Greenough: I think that's repetitious. It's been asked and answered. I have no objection to it being answered.

The Court: I didn't quite get the question.

Q. As to Henry's physical condition, that would be after December, 1945, up until April 1, 1946,

(Testimony of Arletha M. Schlaadt.)

when you and Grover were there. I don't think I covered that period.

A. Well, he broke his arm while he was with us.

Q. That was when you were with him at Davenport?

A. No, when he came to our home with us.

Q. Well, when did he come to your home?

A. First of April.

Q. In 1946? A. Yes.

Q. And how long did he stay with you, then?

A. Well, we were there until a few days before Decoration Day, [66] when he wanted to come home.

Q. At that time didn't he request you to come back to Davenport and look after him?

A. No, he didn't request it, but he said we could.

Q. What was his physical condition outside of his arm being broken?

A. Well, his arm bothered him, and he always used to rub a lot of stuff on him that was quite strong, and he said, "I think my old cancer is coming back." He said, "I have been operated on for cancer, and I believe that that is coming back."

Q. And at that time wasn't it necessary that he have someone look after him?

A. Well, he had had a housekeeper before, and he said, "I'm going to try and get that housekeeper again if I can."

Q. Was the housekeeper there when you and Grover were living with him?

A. No, I never met her.

Q. When did you next come back?

(Testimony of Arletha M. Schlaadt.)

The Court: I'm sorry, I didn't quite get that; you say Mr. Kucks came to Portland with you?

A. Yes.

The Court: And how long did he stay there?

A. Until a few days before Decoration Day; he wanted to come back. [67]

Q. (By Mr. Brooke): Then did you come to Davenport after that? A. Yes, we did.

Q. When?

A. Let's see, I don't remember if it was—1947 we went up and we had gone up for Decoration Day, and then Henry wanted Grover to come back that fall to go up to Canada with him, he said he was taking Mr. Zimmerman and Grover up to Canada with him. I believe it was 1947.

Q. What year did you say that was?

A. Well, now, I'm not sure whether it was 1946 or 1947. Maybe Grover remembers.

Q. And how long did you stay that time?

A. I stayed with Mrs. Zimmerman while they went to Canada.

Q. I see.

A. Because he had a young couple staying in his house at that time.

Q. And were you ever back there after that?

A. Yes, we went up in 1948 for Decoration Day.

Q. Decoration Day in 1948? A. Yes.

Q. And how long were you there then?

A. We had to stay with him pretty near three weeks, on account of the floods were so bad we couldn't get back.

(Testimony of Arletha M. Schlaadt.)

The Court: Was that the year that Vanport was flooded? [68]

A. That's right.

The Court: I was in Portland at that time; I remember that.

A. Well, you know, then, how the floods were.

Mr. Brooke: If I may have just one minute, your Honor.

The Court: Yes, all right. I usually take a recess at 3 o'clock. I'll take a ten minute recess now.

(Short recess.)

Q. (By Mr. Brooke): Mrs. Schlaadt, did you stay with Mrs. Zimmerman in Davenport when Grover and Henry and a few others made a trip to Canada? A. I did.

Q. And during that visit did you not tell Mrs. Zimmerman that you and Grover would not stay in the state of Washington and look after Henry?

A. I did not.

Q. That you wanted to return to Portland, where your family lived? A. No.

Q. You did not make that statement?

A. I did not make that statement.

Q. Do you recall about that time of having a dinner with Mr. and Mrs. Jahnke?

Mr. Greenough: Your Honor pleases, I don't see [69] the materiality of this line of questioning under the pleadings. There's nothing in the pleadings to the effect that there was any agreement by either Mr. or Mrs. Grover Schlaadt or any of the rest of the plaintiffs, I mean the other plaintiff, or

(Testimony of Arletha M. Schlaadt.)

his relatives, to stay there and care for Henry Kucks. I anticipate that's what counsel is driving at by this line of questioning.

Mr. Brooke: May it please the Court, there is in evidence the will made in February, 1946, giving two-thirds to Grover and one-third to Garfield, and I think I'm entitled to lay the foundation for an impeaching question at this time which will be connected up later on when we get into our case.

Mr. Greenough: If it's pertinent to the examination in chief. I don't see that this is at all material and pertinent to that.

The Court: Well, it's doubtful whether it's proper cross-examination, but if you expect to connect it up later, you may go ahead.

Mr. Greenough: May I ask Mr. Brooke if I understand correctly whether you're inquiring now as to the visit concerning which the testimony has been that they went up before Catherina's death and remained until April, 1946?

Mr. Brooke: That's right. [70]

Mr. Greenough: And you're saying this has some effect on the will drawn in February?

Mr. Brooke: I've already asked her whether she and Grover had an agreement to stay there and look after Henry, and she denied that. Now, I'm asking her, for the purpose of laying the foundation for an impeaching question, whether or not she did not make the statement to Mr. and Mrs. Zimmerman at their home to the effect that she and Grover would

(Testimony of Arletha M. Schlaadt.)

not stay in the state of Washington and look after Henry.

A. No.

The Court: The reporter can't see you. The answer is no.

Q. (By Mr. Brooke): Do you recall having dinner with Mr. and Mrs. Fred Jahnke at Davenport, in their home? A. Yes.

Q. Approximately when was that, Mrs. Schlaadt?

A. That was in 1948, I believe, when we came up. We hadn't been in the home very long when Henry said, "I'm going to call Mr. and Mrs. Jahnke up and tell them that the folks are here from Portland."

Q. What?

A. Henry said, "I'm going to call Mr. and Mrs. Jahnke up and tell them that the folks are here from Portland."

Q. And you all had dinner together, did you [71] not?

A. They came down and invited us up for dinner the next day.

Q. You had dinner all together, did you not?

A. Yes.

Q. And during the course of that conversation do you recall the statement being made that Mrs. Jahnke understood you were going to stay there and take care of Henry Kucks, and you replied that you would not stay in the state of Washington for any consideration?

Mr. Greenough: First, this time, again.

Mr. Brooke: She fixed it.

(Testimony of Arletha M. Schlaadt.)

Mr. Greenough: Well, what is it? I want it more specific than 1948 or whatever it was. I think I'm entitled to know the time and place.

The Court: Yes, the time when this occurred.

Mr. Greenough: Well, he's asking the question.

Mr. Brooke: I asked the question and she gave the time.

A. We came up for Decoration Day.

The Court: 1948?

A. Yes.

Q. (By Mr. Brooke): Did you not have a dinner at their home also in 1946? A. Yes.

Q. Before you returned to Portland?

A. We did. [72]

Q. You recall that circumstance? A. Yes.

The Court: Now, is this time before they returned to Portland on April 1, 1946?

Q. Yes, prior to April 1, 1946.

The Court: All right.

Q. Do you know how soon it was before you returned to Portland? A. In 1946?

Q. Yes. A. On April 1.

Q. Was that the day you had the dinner?

A. No, we had it before, because I remember there was a lot of snow on the ground.

Q. And do you know how long before then it was that you had the dinner?

A. It was shortly after mother had passed away; that was in January.

Q. At whose home was that?

A. At Mrs. Jahnke's.

Q. At Mrs. Jahnke's? A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. And at that time did you not make a statement that you would not stay there and look after Henry?

A. I never made any statement like that. [73]

Q. How many times did you have dinner with the Jahnke's, do you recall?

A. Twice that I know of.

Q. Did you ever make the statement on either one of those occasions? A. No.

Q. Do you know what furniture your mother-in-law took up to Davenport? A. I do.

Q. Can you tell me? A. Yes.

Q. Would you?

A. Yes. She took the rug she had just bought, a new rug, davenport and chair, a table, a dining table, and six chairs——

Q. You say a dining table and six chairs?

A. Yes; two rockers, and a dresser, and a bedroom rug.

Q. A small bedroom rug, wasn't it?

A. Yes, nine by twelve.

Q. Is that all?

A. Then a couple of little blankets and a quilt and dishes. She had some dishes there that had belonged to her mother at one time.

Q. Do you know how long Henry had lived in that home before your mother-in-law married him? [74] A. No.

Q. You don't know? A. I don't know.

Q. He lived there with his former wife, did he not? A. Yes, he did.

(Testimony of Arletha M. Schlaadt.)

Q. And they kept house there?

A. They did.

Mr. Brooke: That's all.

Redirect Examination

By Mr. Greenough:

Q. Mrs. Schlaadt, did you ever see Henry Kucks read or write English?

A. The first time I ever saw him write was when he signed his name on the marriage certificate.

Q. Now, you say the first time. Did you ever see him write anything other than his name in English? A. Never.

Q. Did you ever see him read anything in English? A. No.

Q. Now, you testified, I believe, that when you were there in Davenport and following Catherina's death, Henry one day said "I'm going down to make a new will" and later that day you testified he came back and said he had made a new will, and that he had left his property thus and so. A. Yes.

Q. Now, concerning that, Mr. Brooke questioned you as to what [75] land he said he was going to give to Garfield and what land he said he was going to give to Grover. Now, with reference to that will that Mr. Kucks mentioned to you, my question is, did you ever actually see that will?

A. No, I did not.

Q. You know nothing further about it than what Mr. Kucks told you?

A. That's right, that's all I know about it.

(Testimony of Arletha M. Schlaadt.)

Q. Until this lawsuit started and we had a copy of the will, and then you saw it?

A. That's right.

Q. Now, what was the reason for you staying in Davenport following Catherina's death until April 1, 1946?

A. Well, they had to settle an estate of mother's.

Q. They had to settle Catherina's estate?

A. Yes.

Q. And were you required to remain there for that? A. Pardon?

Q. Were you required or obligated to remain there until Catherina's estate was settled in Davenport?

A. Well, Henry wanted us to stay so that he could go back with us to Portland, what he planned on doing, so we waited there until that was settled.

Q. Incidentally, when Henry did go back to Portland with you how long did he remain in Portland with you after April 1, [76] 1946?

A. Well, he wanted to be home for Decoration Day, and we got home just a few days before that time.

Q. When you say "home," you mean Portland?

A. He wanted to be in Davenport for Decoration Day.

Q. Well, I don't think you understood. He went down with you on the first of April and he stayed with you until it was time for him to leave for Davenport by Decoration Day? A. Yes.

Q. And he went back under his own power?

(Testimony of Arletha M. Schlaadt.)

A. No, we drove him back.

Q. How long did you stay after you got him back there for Decoration Day?

A. Well, I don't know just how long it was.

Q. Well, estimate it.

A. About two or three weeks we stayed with him, until he got entirely well.

Q. And then where did you go?

A. Then we went back to Portland.

Q. And stayed there? A. That's right.

Mr. Greenough: No further examination.

Recross-Examination

By Mr. Brooke:

Q. Mrs. Schlaadt, to fix the time of this dinner, wasn't that [77] the time you had the dinner with the Jahnkes, after you came back with Henry from Portland?

Mr. Greenough: I think she testified she had dinner there on two occasions.

Q. All right; did you have one dinner when you came back with Henry on Decoration Day?

A. No, we didn't have Henry with us. We came alone, because he said "I'm going to call Mr. and Mrs. Jahnke up and tell them that you folks are here," and then she came down the next day and invited us to dinner.

Mr. Brooke: That's all.

(Whereupon, there being no further questions, the witness was excused.)

FLOYD J. UNDERWOOD

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Greenough:

Q. Your name is Floyd J. Underwood?

A. Yes, sir.

Q. And you're a member of the bar of the state of Washington, and a member of this bar?

A. Yes, sir.

Q. And you reside and conduct your main practice at Davenport, Washington? A. Yes, sir.

Q. And you are the Floyd Underwood who prepared the wills of [78] Henry Kucks which have been admitted here in evidence? A. Yes, sir.

Q. And you acted as his attorney during his lifetime, at least from some time antecedent to the time you prepared the first of those wills? Your first employment was, I believe, when he employed you to probate his deceased wife's estate?

A. The first employment I had from Mr. Kucks was when he employed me to probate the estate of Ida Kucks, his first wife.

The Court: When was that, about?

A. Why, your Honor, it was about in the neighborhood of '43, I believe, your Honor. I can't offhand recall the date.

The Court: Well, I don't care for the exact date. I just wanted to know the year.

A. He didn't probate Ida's estate for some time

(Testimony of Floyd J. Underwood.)

after her death; a period of about three or four months elapsed before he commenced it, your Honor.

Q. You are aware, Mr. Underwood, that in addition to the estate that Mr. Kucks left in the state of Washington, he did leave some land which he owned in Canada?

A. You mean at the time of his death?

Q. Yes.

A. He did not own any land in Canada at the time of his death. Well, I'll qualify it by making this statement, if I may; [79] Mr. Kucks prior to 1946 had owned some land in Canada, and he entered into an oral agreement, the contract I don't believe was ever signed, for the sale of that land, and then in 1949, I believe it is, he entered into a written contract for the sale of that land which was in effect as of the date of his death, so he owned the land. It was subject to this contract of sale, and I do not believe it was in escrow, your Honor.

Q. Did you know the extent of that land?

A. I believe it was a half section of land. I believe that's right.

Q. And situated in the province of Alberta?

A. Well, I wouldn't say for sure, Joe. I could look at my file if you'd care for me to verify it, but it's, I believe, in Alberta.

Q. Well, it was wheat land, was it not, generally farmed for wheat in western Canada some place?

A. That's right.

Q. Miss Hardin, will you hand me plaintiff's

(Testimony of Floyd J. Underwood.)

exhibit number 4, please? Mr. Underwood, I am inviting your attention to plaintiff's exhibit number 4, which is a will of Henry Kucks to which is attached an envelope. Are you familiar with that exhibit? A. Yes.

Q. You prepared that will as Mr. Kucks' attorney, did you? [80] A. I did.

Q. And after its preparation and execution by him you delivered it to him, supplying him the envelope which is attached, in which the will was to be enclosed? A. I did.

Q. And after Mr. Kucks' death, in the presence of Grover Schlaadt, Sr., you opened a safe deposit box of Mr. Kucks' and in it found that will?

A. That's right.

Q. And you delivered that will to Mr. Grover Schlaadt, saying something to the effect "Here, maybe you'll want to keep this"?

A. That's right.

Q. Did you find in that safe deposit box at that time any wills other than this one?

A. I do not recall——

Q. Do you recall——

A. ——just now, where the original will came from, I mean that is filed in the court down there.

Q. You mean the one that's being probated?

A. That's right.

Q. You don't recall where that came from?

A. I believe it was out of the bank box, but I do not recall.

Mr. Kucks—excuse me. Go ahead.

(Testimony of Floyd J. Underwood.)

The Court: I'm not sure I understood you. You [81] found this one after Henry Kucks' death in his box? A. That's right.

Mr. Greenough: That's exhibit 4, and then he delivered it to Grover Schlaadt, Sr., then I asked Mr. Underwood if he found any other wills in the box at that time, and he says he doesn't remember.

A. Your Honor, I do not recall where the will that is in probate was at the time of Mr. Kucks' death, now, to speak the truth, I mean.

Mr. Greenough: No further questions.

Cross-Examination

By Mr. Brooke:

Q. Did you prepare any other wills for Mr. Kucks? A. I did.

Q. And those are plaintiffs' 5, 6, 7 and 8?

A. Well, Mr. Brooke, I can't say for sure as to the numbers of them, from here.

Mr. Greenough: Well, we'll stipulate that that's what he testified in his pretrial deposition. They're all in evidence, and they all bear Mr. Underwood's signature as a witness.

The Court: Was it the last one that was probated in Lincoln County Superior Court, that is, the one of August 27, 1949?

A. That's the last one. The second one I prepared for him on the 11th day of February immediately following [82] Catherina's death and immedi-

(Testimony of Floyd J. Underwood.)

ately following the closing of her estate in Lincoln County, Washington.

Q. Now, at the time you prepared the first will, which is exhibit 4, did you have any conversation with the decedent? A. This will?

Q. Yes. A. Yes, sir.

Q. And who was present? A. Mr. Kucks.

Q. Anyone else?

A. Not at the first time that I talked to him about it, no.

Q. When it was executed who was present?

A. Why, Mr. Kucks, Mr. John Henry Kucks; Catherina Kucks; myself; and my two secretaries, Amy Loughben and Lois McKee.

Q. What conversation if any did you have with Henry Kucks about preparing that will?

Mr. Greenough: Now, if your Honor please, I object to this as not proper cross-examination.

The Court: Well, I don't believe it is.

Mr. Greenough: All I did with the witness was establish the fact that when he opened the safe deposit box this exhibit 4 in the envelope was found in there, and that Mr. Underwood gave it to Grover Schlaadt, Sr., and I attempted to establish the fact that was the only [83] will found in the box, but his memory was blank, and that's as far as I went with him.

The Court: I don't believe it is proper cross-examination.

Q. You don't recall where you got the will that is being probated at this time in Lincoln County?

(Testimony of Floyd J. Underwood.)

A. I can't recall definitely, Mr. Brooke, right here, just where that will came from, whether I had it in my safe or whether it was in the box or where it was.

Q. I see.

A. I can't tell you definitely.

Q. Did he have a safety deposit box at that time?

A. He had a safety deposit box in the bank, and when the wills were made out he took them with him.

Mr. Brooke: That's all.

A. That is, generally speaking.

Mr. Brooke: I see. That's all.

Mr. Greenough: No further examination, your Honor.

(Whereupon, there being no further questions, the witness was excused.)

NEVA SCHLAADT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Greenough:

Q. Your name is Neva Schlaadt?

A. That's right. [84]

Q. And you are the wife of Grover Schlaadt, Jr.? A. Yes.

Q. And Grover Schlaadt, Jr., is the son of

(Testimony of Neva Schlaadt.)

Grover Schlaadt, Sr., who is a plaintiff in this action? A. Yes.

Q. Where do you reside, Mrs. Schlaadt?

A. In Portland, Oregon.

Q. With your husband? A. Yes.

Q. And what is your address?

A. 5224 Southeast 92nd Street.

Q. Did you reside there in 1944?

A. No, we lived on Yukon Street, in the city of Portland, though.

Q. In 1944? A. Yes.

Q. And when you lived on Yukon Street in 1944 you and your husband were residing together?

A. Yes.

Q. Do you and your husband have any children?

A. Yes, we have a son.

Q. How old? A. Seventeen years old.

Q. And in 1944 did your son reside with you in Portland? A. Yes. [85]

Q. And had you resided in Portland during your married life? A. Well, most of it.

Q. Well, when you say most of it——

A. Well, with the exception of about a year or so in 1940 and 1941, but the rest of the time we had lived in Portland.

Q. And all during that time that you had this son who is now seventeen, the son live with you?

A. Yes.

Q. I'm going to put a question to you somewhat out of order, but I'm afraid I might forget it. You were of course acquainted with Henry Kucks?

(Testimony of Neva Schlaadt.)

A. Yes.

Q. Did you ever see him read English?

A. No.

Q. Did you ever see write English?

A. No, I never.

Q. He was German by descent, was he not?

A. Yes.

Q. And he wrote and read German?

A. Well, I couldn't say. I never seen him do either.

Q. Can you, yourself? A. No.

Q. Now, inviting your attention, Mrs. Schlaadt, to the year 1944 and particularly to the month of June and the months [86] immediately following June of that year, you recall, do you, that Catherina Schlaadt was married to Henry Kucks? You recall a marriage occurring between them?

A. Oh, yes.

Q. Now, prior to that marriage, did you have any conversations with Catherina concerning her forthcoming marriage? A. Yes.

Q. Will you tell the Court, please, what was said between her and you on that subject at that time?

A. Yes.

Mr. Brooke: Now, just a moment; I presume it's understood that my objection of the former witness along this line will stand as to this witness also.

The Court: Yes, I think the record should show your objection, and it will be overruled. Proceed.

(Testimony of Neva Schlaadt.)

Mr. Greenough: Will you read the last question?

(Last previous question read by the reporter.)

A. Pardon me, I didn't get that.

Q. Well, maybe you're a little bit off the track here. You have testified that prior to Catherina's marriage to Henry Kucks—— A. Yes.

Q. ——you had some conversation with her in which she made some statements concerning her forthcoming marriage to Henry Kucks. [87]

A. Yes.

Q. Now I'm asking you, what did she say in that conversation?

A. Well, she told us that Henry——

Q. Who is "us"?

A. My husband and I; Grover, Junior.

Q. Maybe we'd better fix the time and place as accurately as we may of that conversation. Where did it occur?

A. Well, it occurred in Grandma's house.

Q. At Catherina's house?

A. Yes, that's right.

Q. And who was present?

A. Well, my husband, Grover, Junior, and I, and Grandma.

Q. Can you fix the time with reference to her marriage, for example, how long before her marriage?

A. Well, she had already accepted the proposal.

(Testimony of Neva Schlaadt.)

That was between the proposal and the wedding day.

Q. All right. What did she say to you and your husband?

A. She told us the proposition that Henry had made her.

Q. What did she say that proposition was?

A. Well, she said that Henry had promised to leave his estate to her two boys if she would marry him.

Q. Go ahead. What else did she say?

A. And so she then said, "You know, I'm thinking about my kids." She said, "What do you think about us getting married?" Of course, she was just asking Grover and I [88] our opinion of her marrying him. Well, we told her that was up to her, that she had known him a long time, and that was her decision to make. Well, she said that she was looking out for her kids, that was the main thing.

The Court: Pardon me, but I thought I heard you say your husband Grover, Junior, was present, and also Grandpa.

A. No, Grandma.

Q. By "Grandma" you mean Catherina?

A. That's right.

The Court: Oh, you meant Mrs. Schlaadt?

A. Yes.

Q. Did she make any statement to you with reference to her confidence in Henry Kucks?

A. Yes, she said she thought he was a man of

(Testimony of Neva Schlaadt.)

honesty, that she could trust what he said, that she was taking his word for it on that proposal of the marriage.

Q. Did she say anything to you at that time which indicated she intended to or had accepted his proposal?

A. Yes, she had already accepted his proposal at that time.

Q. Was she wearing an engagement ring at that time? A. That I don't recall.

Q. But she told you she had accepted the offer?

A. Yes.

Q. Now, subsequent to the marriage did you have any conversation [89] with Henry Kucks concerning his marriage to as you call her, Grandma, that is, Catherina? A. No.

Q. This is after the marriage.

A. We hadn't talked to Henry before the marriage, not until the wedding day.

Q. Maybe you don't understand the word subsequent. After the marriage had been performed, was there any occasion upon which you had conversation with Henry Kucks about the marriage?

A. Yes, the evening of the wedding.

Q. Where did that conversation occur?

A. That was at Grandma's house while dinner was being prepared, that was the wedding dinner.

Q. That was the wedding dinner, you say?

A. Yes.

Q. Now, who was present at that conversation?

A. Well, Grover, Junior, my husband, and I, and

(Testimony of Neva Schlaadt.)

Henry were sitting on the front porch. We were just kidding him along and asking him what he thought of his new bride, and then he told us he had known Kate for a good many years, and that he was sure they would be happy, and he said, "You know, I promised Katie if she would marry me that I would see that her two boys would be left my estate." [90]

Q. You say just the three of you were present on the front porch at that time; there were other members present at the house, were there, other people?

A. Yes, they were preparing dinner in the inside of the house.

Q. Do you recall who they were?

A. Yes, there was my mother-in-law and father-in-law, and Grandma, and then our son. Well, Henry and us was on the porch.

Q. Now, subsequent to that occasion upon the front porch of your Grandma's house, did you have any conversation with Henry Kucks concerning his marriage to Grover, Junior's mother, or grandmother, I should say?

A. No, not before the wedding.

Q. Before they went back to Davenport?

A. No, we didn't see Henry until the wedding day.

Q. I'm talking now, Mrs. Schlaadt, subsequent or after the wedding day, after the wedding and after this occasion upon the porch. You've testified that the wedding occurred. That evening after the wed-

(Testimony of Neva Schlaadt.)

ding there was a party at Grandma's house. Now, after that.

A. Oh, yes; well, we had them out to our house for dinner a couple of nights after that.

Q. Now, "we" is who? You and your husband?

A. Yes, and then he again, after dinner was over we was [91] sitting around talking, he again repeated this same story about the proposition that he had made Grandma in order to talk her into marrying him.

Q. Now, on these occasions, on this occasion, for example, at dinner at your house, was that subject brought up—by whom was that subject brought up, the subject of the marriage and what the terms were?

A. Henry brought it up himself; he seemed to be quite happy over the situation, and wanted to talk about it. He was the one that brought up this subject himself.

Q. Now, did you ever visit Catherina and Henry at Davenport after the marriage?

A. Yes, we did.

Q. When was that?

A. In '45, over Decoration Day.

Q. On Decoration Day of '45?

A. I mean Labor Day.

Q. Who was at Henry Kucks' home at that time when you visited him?

A. Well, my mother-in-law and father-in-law was there, they had gone there a few days before we

(Testimony of Neva Schlaadt.)

arrived, and then Grandma and Henry, and then my husband and I and our son.

Q. Was there any conversation at that time concerning the marriage?

A. Well, I don't recall any. [92]

Q. What was Henry's attitude toward you and your husband at that time?

A. He treated us very lovely, took us to Grand Coulee, and when we left, he gave us eggs, and gave us $10.00 to help out on our expenses home, and cried when we left, and wanted us to come back any time to see him.

Q. Now, in 1941 I think there was an incident, an occasion when Ida, that was Henry's first wife, Henry and Ida visited you or at least were in Portland and you went shopping with them?

A. That's right.

Q. Tell the Court what happened on that occasion with respect to the luncheon that you had.

A. Well, after we did a little shopping we went and had lunch. At that time Henry or Ida, his former wife, neither one could read, and they had me read the menu to them.

Q. And being in Portland, Oregon, I assume the menu was written in the English language?

A. That's correct.

Mr. Greenough: No further examination.

Cross-Examination

By Mr. Brooke:

Q. Mrs. Schlaadt, was that the first time you met Mr. Kucks?

A. In 1941, yes.

(Testimony of Neva Schlaadt.)

Q. And when is the next time you saw him? [93]

A. Well, I couldn't say that. They made, oh, maybe a couple of trips down to see Grandma, he and his former wife Ida.

Q. And how soon was this before the wedding that you heard him make this—or that Mrs. Schlaadt told you about the proposition?

A. Well, it was between the time that she had accepted his marriage, and the time that they were married.

Q. She had already accepted? A. Yes.

Q. And the sole proposition was that if she would marry him he would leave his property to the two boys? A. Yes, that's right.

Q. And did he say how it would be divided?

A. No, he didn't tell us that.

Q. And that was the entire agreement, was it, Mrs. Schlaadt? A. Yes.

Q. And then once again you heard that same——

Mr. Greenough: We'll stipulate, if your Honor please, that's all we claim, that was his offer, that he would leave his property upon his death to the two boys, and didn't specify in that offer any mode of division between the two of them; that's stipulated.

Mr. Brooke: Then you're stipulating also that the sole consideration was her promise to marry him? [94]

Mr. Greenough: Her marriage to him.

Mr. Brooke: Yes. Are you stipulating that, too?

(Testimony of Neva Schlaadt.)

Mr. Greenough: Well, her marriage to him, and the attendant circumstances, that she left Portland, Oregon, in a comfortable home and happy circumstances and went up to a comparatively strange community; all that follows necessarily her marriage. We'll stipulate that.

The Court: I think you may as well proceed with the testimony.

Q. (By Mr. Brooke): Then the only other occasion was when he was at your house for dinner?

A. That he made the statement to us?

Q. Yes. A. Yes.

Q. And how did that happen to come out?

A. Well, we just got sitting around talking after dinner, and he brought it up himself. He seemed to kind of want to talk about it, for some reason or other.

Q. And he used the identical language that your grandmother had? A. Well, the same thing.

Q. He said if she would marry him, why, he would leave the property to the two boys, is that right? A. That's right.

Q. And that matter wasn't discussed when you were up in [95] Davenport? A. No.

Q. How long were you up in Davenport?

A. We were only there about a couple or three days. It was just over Labor Day.

Q. And where did you stay?

A. At Henry's home.

Q. He didn't discuss any of his financial affairs with you, did he? A. No; not at that time.

(Testimony of Neva Schlaadt.)

Q. And when he was down in Portalnd he didn't mention any of his financial affairs?

Mr. Greenough: On what occasion, please, Mr. Brooke?

Mr. Brooke: About the time of the wedding, the day before the wedding.

Mr. Greenough: And I think the term "financial affairs" might confuse the witness. Do you mean how much he was worth?

Q. (By Mr. Brooke): Well, did he discuss anything except this contract you referred to, or this proposition?

A. Well, he mentioned his estate, but outside of that he didn't state just what things were. He said his estate, his property.

Q. His estate, that's right. That's all. [96]

The Court: Any other questions of this witness?

Mr. Greenough: None, your Honor.

(Whereupon, there being no further questions, the witness was excused.)

GARFIELD SCHLAADT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Greenough:

Q. State your name, please, Mr. Schlaadt.

A. Garfield Schlaadt.

Q. Where do you reside?

(Testimony of Garfield Schlaadt.)

A. San Francisco California.

Q. How long have you resided there, Mr. Schlaadt?

A. I believe since 1923, 1922 or 1923. I think I went down there in March, 1923.

Q. That's close enough. Are you married?

A. I am.

Q. And what is your wife's name?

A. Anastasia.

Q. Is she in the courtroom here, incidentally?

A. She is.

Q. How long have you been married?

A. Since 1929.

Q. Is your marriage to your present wife your only marriage? A. It is.

Q. Is it her only marriage? [97] A. It is.

Q. Do you have children, Mr. Schlaadt?

A. We have an adopted daughter.

Q. How old is your adopted daughter?

A. Twenty.

Q. Were you acquainted with Henry Schlaadt, or excuse me, Henry Kucks? A. I was.

Q. Where did you meet him, first, Mr. Schlaadt?

A. It was on his return from the East, the St. Louis Exposition. Returning to Davenport, he stopped off and visited us at Helena, Montana.

Q. You lived in Helena at that time?

A. Yes.

Q. That is, you lived there along with Grover, your brother, and your mother and father?

A. Yes.

(Testimony of Garfield Schlaadt.)

Q. It was the family home at that time?

A. Yes.

Q. That was when, 1904? A. 1904.

Q. Now, did you later, after your initial meeting with him in 1904 in Helena, did you have occasion to be with him for periods of a day or two at a time, something of that sort? [98] A. Yes.

Q. What was the first of those periods following 1904?

A. 1909, the Alaskan-Yukon Exposition. A group of us were out there, including my grandmother, Henry Kucks, his deceased wife, Ida, my uncle John, and a hired man that worked for my uncle and grandmother. I believe that's all.

Q. You all went to the exposition in Seattle together? A. That's right.

Q. That is, you folks started from Helena, and you picked up Henry at Davenport?

A. I couldn't say just where we picked them up, but we did all come back the same time.

Q. You stayed together, the two families were more or less the same party during the time that you were in Seattle at the Alaska-Yukon Exposition?

A. That's right.

Q. Then following that——

The Court: When was that, in 1910?

A. 1909, I believe, your Honor.

Q. Then what was the next occasion of your spending any time of a day or so with Henry?

A. I enlisted in the service in the first World

(Testimony of Garfield Schlaadt.)

War in December, 1917, and I was at Fort Wright for a period of two months.

Q. You enlisted at Fort Wright? [99]

A. I enlisted at Fort Wright.

Q. You came from Helena to Fort Wright?

A. And I enlisted, and I was there for a period of about two months, and in that period Henry Kucks took the time and effort to look me up at the Fort Wright, and he contacted me out there, and I happened to be on K.P., and he says "Could you get off?" Well, I said "I don't know"——

Mr. Brooke: Just a moment.

Q. Well, you did get off K.P. through the grace of your commanding officer, and he took you to dinner that night?

A. That's right. We came to town that afternoon. We went to a show. After the show we had dinner. After the dinner we went up to his hotel room where we had a few drinks. I stayed with him that entire evening, spent the night with him at the hotel.

Mr. Brooke: Just a moment. Your Honor, this is very interesting, but I don't think it proves any material issue, and furthermore I think it violates section 1211, and I don't want to be precluded by waiving the statute by sitting silent.

Mr. Greenough: I hadn't thought of 1211 because it didn't seem so important.

Mr. Brooke: He's a party to this action.

Mr. Greenough: It's only offered for the purpose of showing that when Henry Kucks made this

(Testimony of Garfield Schlaadt.)

offer to [100] Catherina Kucks which would benefit her sons, that he wasn't benefiting two entirely unknown persons; he had known these boys for a long time. That's the only offer, and perhaps it is violating section 1211.

The Court: I'll let it stand. If the transaction of having drinks together comes within the statute, it isn't one of the issues here.

A. And during the course of the evening, that was the afternoon I think, we attended the show, I spent the evening with him, stayed overnight in the hotel, and when I went back to the Fort in the morning he says, "Garfie, I haven't much money with me," but he says "I'll give you all I have, leaving me just enough to get back to Davenport," and he gave me somewheres in the neighborhood of $15.00.

Q. Now then, after the first war was over did you see Mr. Henry Kucks again?

A. When I was discharged in July of 1919 I went to visit my mother and father in Portland, and on my return to Montana I stopped off in Davenport by the wishes of Henry Kucks.

Q. He had requested you to stop?

A. Yes, he asked me to stop off, and I visited him there several days. We made a trip through the Coeur d'Alene country by automobile to inspect some of his farm land; he had half an orchard there, I believe it was five acres, and we made quite a tour of that territory at that time, [101] and on another occasion we made a trip in Lincoln County

(Testimony of Garfield Schlaadt.)

to visit these farmers. He seemed to be well liked among all of them.

Q. Did he make any request of you on that occasion?

A. Yes, he did. He says "What are you going back to Montana for? Why don't you stay here with me?"

Q. Did he and Ida, his first wife, have any children? A. Not born to them, no.

Q. So that when he made this request that you stay there at his place, he had no children of his own staying there?

A. That was just Henry and Ida.

Q. Now, did you have a visit with him during 1946?

A. That was—we made a trip up there, I believe it was in 1946. We drove up. That was after mother's death. We called on him. Mother died in January, I believe it was, and we went up there in August of that year and we stayed there about three days.

Q. Mr. Schlaadt, did you ever see Henry Kucks read the English language?

A. No, I never did. Matter of fact, when we were in the show, it was silent movies those days, and between the scenes——

Q. "Those days"; when was that, now?

A. In 1917.

Q. This is the occasion when he took you to the movie, when [102] you were in the army?

A. Yes, and between the scenes when they flashed

(Testimony of Garfield Schlaadt.)

the words on the screen I had to read it to him so he could follow the picture.

Q. Did you ever see him write the English language? A. No.

Mr. Greenough: No further examination.

Mr. Brooke: No questions.

(Whereupon, there being no further questions, the witness was excused.)

GROVER SCHLAADT, JR.

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Greenough:

Q. Grover, your name is Grover Schlaadt, Jr., and you're the son of Grover Schlaadt, Sr., one of the plaintiffs in this case? A. Yes, sir.

Q. And Neva Schlaadt, who testified as the second preceding witness, is your wife?

A. Yes, sir.

Q. And you heard her testimony as to the fact of your residence in Portland, and the various addresses, the two addresses, where you have resided there? A. Yes.

Q. And the fact you have a son seventeen years old who up to [103] 1944, through that year at least, resided with you in Portland? A. Yes, sir.

Q. And that testimony is all correct, is it?

A. It is.

(Testimony of Grover Schlaadt, Jr.)

Q. How old are you, Grover? A. 39.

Q. Do you recall the occasion of the marriage of your grandmother Catherina Schlaadt to Henry Kucks? A. I do.

Q. Now, prior to that marriage was there any occasion upon which Catherina talked with you concerning the forthcoming marriage? A. Yes.

Q. What was that occasion, Mr. Schlaadt?

A. Well, it was an occasion just previous to the marriage, after she had returned from Davenport, having accepted Henry's proposal.

Q. And where did the conversation occur?

A. At her home on View Point.

Mr. Brooke: I don't know whether it's necessary for me to make an objection to this witness.

Mr. Greenough: No.

Mr. Brooke: I don't want to overlook anything.

The Court: I think it's a wise precaution to have [104] the record show that you object to this line of testimony for the reasons you've given, and I'll rule upon it for the reasons discussed before, and overrule the objection.

Q. (By Mr. Greenough): Where did that discussion occur?

A. In her home on View Point Terrace in Portland.

Q. In Catherina's home? A. Yes.

Q. Who was present at that time?

A. My grandmother, my wife, my son, and myself.

Q. Your grandmother is Catherina Schlaadt?

(Testimony of Grover Schlaadt, Jr.)

A. Yes.

Q. Your son was there too, was he?

A. Yes.

Q. He's seventeen now? A. Yes.

Q. Now, tell the Court, Grover, as well as you can recall, what was said by Catherina on that occasion?

A. Well, she had just returned, said she had accepted Henry's proposal, and that she knew him to be an honest, upright man, he would keep his promise, and that after they were married, why, he would fix it so that should anything happen to him, why, the property that he had would go to her boys, because he didn't have anyone in the world to leave it to, he was more or less an orphan.

Q. Did she say anything as to the reason she was accepting [105] his proposal?

A. She said——

Mr. Brooke: Just a minute; I'm going to object to that on the further ground that her reasons for accepting it are immaterial.

Mr. Greenough: I think not.

The Court: I'll overrule the objection and accept it on the same basis as the other, as showing her state of mind.

Mr. Greenough: Showing the reason for her marriage?

A. Well, she had a nice home and a lot of friends, and the reason I believe that she——

The Court: I think we're getting into the witness' ideas now.

(Testimony of Grover Schlaadt, Jr.)

Q. What did she give as her reason for deciding to accept his marriage proposal?

A. The fact that he said he would turn over his estate to her boys after their marriage, and his decease.

Q. Did you attend the marriage? A. No.

Q. Subsequent to the marriage what was the first occasion upon which you saw Henry Kucks?

A. The night or the evening after the marriage, the evening after the day after the marriage.

Q. Well, was it the same day as the marriage? [106] A. It was the same day.

Q. That evening? A. Yes.

Q. Where did you see him?

A. At Grandma's home on View Point Terrace.

Q. And what was the occasion of your seeing him there?

A. It was a marriage dinner, a celebration of their marriage.

Q. Who was present at that marriage dinner?

A. My father, my mother, my grandmother, Henry Kucks, my wife, my son, and myself.

Q. And on that occasion was there anything said to you or in your presence by Henry as to the arrangements under which he had married your mother, or your grandmother, that is?

A. Yes. When we came to the house, Henry, my wife and I were out on the porch at some time during the evening, and he greeted us and he said that he and Katie had known each other a long time, he

(Testimony of Grover Schlaadt, Jr.)

said of course there wasn't too much love at their age, but that he had a lot of property, that he didn't have anyone to leave it to, but the proposition was if the two of them would get married, why, he would leave his property ultimately to her boys.

Q. Did he say anything about the thought that the arrangement would be compatible and happy for him and Katie both?

A. Yes, he did. He said he had known her ever since she was [107] a child.

Q. Now, you say this was when you and your wife and Henry were on the front porch. Was there anyone else present at that particular time?

A. No.

Q. Where was the rest of the party?

A. The rest of the family was in the house preparing dinner, or in the house, at least.

Q. Now, subsequent to that wedding dinner party, Mr. Schlaadt, did you have another occasion upon which there was conversation by Mr. Kucks as to his marriage with Catherina? A. Yes.

Q. When was that?

A. One or some days later they came out to our home on Yukon Street in southeast Portland, in the city of Portland, and had dinner with us.

Q. And when you say "they," you mean Catherina and Henry? A. Yes.

Q. And did they come at the invitation of yourself and your wife? A. Yes.

(Testimony of Grover Schlaadt, Jr.)

Q. What was said on that occasion by Henry along the subject of his marriage to Catherina?

A. He seemed to be happy——

Q. Not what he seemed to be. What did he say? [108]

A. He said he was happy with the marriage, he had known my grandmother for many years, and he reiterated one of the prime reasons they got married was so he could leave his property to their boys. He had no other children. He had no one.

Q. Did you visit Catherina and Henry in Davenport after they moved up there? A. Yes.

Q. When was that?

A. In the vicinity of Labor Day, 1945.

Q. Do you recall any conversation on that occasion by Henry as to the marriage arrangement?

A. I don't recall any.

Q. What was his attitude towards you and your wife on that occasion?

A. He was very friendly to us, and treated us just like a real grandfather would, and when we left, he gave us a whole basket of eggs, many dozen, and he gave me a ten dollar bill, which I didn't want to accept, but Henry wasn't the kind of man you could say no to without making him mad, so I did take the money, and he didn't want us to go, he wanted us to stay longer.

Q. Now, you mentioned to me, this might not be an exactly proper procedure, your Honor and counsel, but you mentioned to me one occasion upon

(Testimony of Grover Schlaadt, Jr.)

which Henry had occasion [109] to introduce you to the sheriff of Lincoln County, and I've forgotten just when it was. Would you tell the Court about that?

A. Well, we were notified of Grandma's death around the 10th of January, or such, and it was quite cold weather, and as we were coming across the highway from Ritzville——

Q. Who is "we," incidentally?

A. My wife, my son, my brother and myself.

Q. All right.

A. We had a little fender scraping where some farmers had stopped to cross a fence, and I scratched his fender because of the road conditions being slippery and quite snowy, and when we got to Davenport I said to Henry, "I'd better go up and report this to the local authorities," because I didn't want to leave an accident unreported, besides I thought I might get the fender fixed, but we went to the county courthouse, it was either the sheriff or one of the county officials, and Henry introduced me to this gentleman as his grandson, and I reported the accident at that time. I never heard of it after that, though.

Mr. Greenough: No further examination.

Cross-Examination

By Mr. Brooke:

Q. What year was that, Mr. Schlaadt?

A. That was the year that my grandmother died. [110]

(Testimony of Grover Schlaadt, Jr.)

Q. In 1945? A. 1946.

Q. January, 1946? A. Yes.

Q. And what was Henry's mental condition at that time?

A. Well, he was a man of around 83 years old, and I thought his mental condition was very good.

Q. He was still looking after his business affairs, wasn't he? A. I believe he was.

Q. And in your opinion he was capable of doing that? A. I think so.

Q. And what was his physical condition at that time?

A. Well, he didn't complain to me. I couldn't say as to his exact physical condition.

Q. And he was pretty well—he had a mind of his own, didn't he? A. I would say he did.

Q. In other words, if he wanted to give you that ten dollar bill, why, you had to take it, was that about the size of it? A. Yes.

Q. Now then, how many times did you see him down in Portland? A. How many times?

Q. Yes. [111]

A. From what period to what?

Q. At the time he married your grandmother.

A. To my knowledge, two times.

Q. And both times you saw him, why, he brought up the fact and made the statement that your grandmother had promised to marry him, and in consideration of that he agreed to leave his estate to the two boys? A. Yes.

(Testimony of Grover Schlaadt, Jr.)

Q. And how did that statement happen to come up, or that conversation happen to come up?

A. It seemed to be voluntary on his part.

Q. And the first time that statement came up he was not present, was he? That was after your grandmother had returned from Davenport.

A. He wasn't present then.

Q. No, he wasn't present during that conversation.

Mr. Greenough: Well, now, just a minute——

A. That was previous to the marriage.

Mr. Greenough: The question was, if your Honor please, his previous question was that on two occasions during Henry's marriage trip to Portland, this witness had conversation with Henry about the marriage.

The Court: Yes, I know. Mr. Brooke is talking now about the conversation with Mrs. Schlaadt when he wasn't present. Is that correct? [112]

Mr. Brooke: That's right.

Q. (By Mr. Brooke): In other words, there was one conversation with Henry the day after the marriage, and then another time out at your house; right?

A. One time the day of the marriage.

Q. The day of the marriage. Where did that take place?

A. At my grandmother's home, on the front porch.

Q. Was that after the marriage?

A. Yes, it was the evening of the day of the marriage.

(Testimony of Grover Schlaadt, Jr.)

The Court: You mean the conversation was on the front porch, not the marriage. It was a little doubtful.

Q. Did he make any statement as to how he was going to divide that between the boys?

A. He made no statement of that type to me.

Q. You knew he had a daughter? A. Who?

Q. You knew your grandmother had a daughter, did you not? A. Yes.

Q. Was anything said about her at any time?

A. Not to my knowledge.

Q. You and your wife have discussed what your testimony would be in this case, I presume, haven't you?

A. I don't quite understand the question.

Q. You've discussed this case on numerous times, have you not, since Mr. Kucks died? [113]

A. Yes.

Q. And your testimony is substantially the same as your wife's, is it not? A. Yes.

Mr. Brooke: I think that's all.

Redirect Examination

By Mr. Greenough:

Q. I might ask you one question. You and your wife discussed this case with me and Mr. Kizer yesterday morning in our office, did you not?

A. Yes, sir.

Q. And we went over what you were able to testify, with you? A. Yes.

(Testimony of Grover Schlaadt, Jr.)

Q. And again this morning in probably a twenty or thirty minute period you went over with me individually what you were going to be able to testify?

A. Yes, sir.

Q. And your wife did likewise?

A. Yes, sir.

Q. And all the rest of the witnesses we've called here today did likewise? A. Yes, sir.

Mr. Greenough: All right, no further questions.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Greenough: We have no further witnesses, your [114] Honor. We rest our case.

The Court: I had intended to adjourn at 4:30 and I have your memoranda that I think pretty well set out your position and authorities, and I think it would be wise probably to adjourn and hear your argument in the morning. I presume you wish to question the sufficiency of the evidence?

Mr. Brooke: Yes, I have a motion to make, and I'd like to give one or two more authorities.

The Court: Suppose you state your motion, and then both sides give me any more authorities you have, and I'll hear your arguments in the morning.

Mr. Brooke: At this time, the plaintiff having rested, the defendant moves the court for an order dismissing the complaint upon the ground and for the reasons that the plaintiff has wholly failed to prove the allegations of the complaint by any substantial evidence, and upon the further ground that the testimony conclusively shows that the agreement

relied upon is an oral contract to devise property, which is void under the statute of frauds, because not in writing; second, upon the further ground that the contract is void because it is a contract the sole consideration of which was marriage (citing authorities) and upon the further grounds that the testimony has shown that there was not sufficient performance [115] of this contract to take it out of the statute of frauds. The authorities are listed in here showing that the subsequent marriage of the parties was insufficient performance to take any agreement in consideration of marriage out of the statute, and furthermore, upon the grounds and for the reasons that the making of a will, even though in accordance with the terms of the contract, which we do not agree in this case, is not sufficient part performance to take it out of the statute of frauds.

(Whereupon, at 4:30 o'clock p.m. the Court took a recess in this cause until Tuesday, July 1, 1952, at 10 o'clock a.m.)

Tuesday, July 1, 1952—10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Mr. Brooke: In addition to the motion we made at the conclusion of the case last night, I wish to also urge the motion to dismiss on the grounds that the complaint does not state a claim that entitles the plaintiffs to any relief, and I understand such a

motion may be interposed at any time as a general demurrer, or may be argued at any time.

(Argument by counsel for the defendants.) [116]

The Court: I might say before you start, Mr. Kizer, that it is my view that this motion to dismiss interposed at this stage of the trial is in effect a demurrer to the evidence, that is, it questions the sufficiency of the evidence to entitle the plaintiff to relief, and I should think that comparable to the situation when a motion for directed verdict is made, that I would regard the evidence in the light most favorable to the plaintiff, and would not be required to say at this time that the facts that have been established are to the extraordinary degree that is required by the Washington State Supreme Court cases that have been cited here.

Of course, while I'm only expressing a tentative view, a view in the light of the evidence that's been adduced so far, there is this to consider, that if you believe a witness, then his testimony is convincing beyond a reasonable doubt. If you don't believe him, why of course that is a different story, and at this time I credit the testimony of the witnesses here, and I think it finds corroboration in the subsequent conduct of Mr. Kucks. It's true his first will was to the wife, and that she had a daughter, but when we consider that these people were not only not versed or did not have a knowledge of the law or the principles of law involved, but Mr. Kucks didn't read and write the English language, while

he was no doubt a [117] man of good judgment and considerable intelligence, nevertheless it isn't at all unusual that he should, in carrying out a promise of this kind, first make his will to his wife, and then make it out to the two boys in the way that he did.

A thing that appeals to me is that here is a widow woman about, as I recall, 76 years of age. She's been widowed for a good many years. It isn't one of these rebound situations where even an elderly person in the first shock of loneliness and loss takes a companion by marriage by way of relief. She had been widowed for a good many years. She had settled down in a comfortable home in Portland, and had her children and her grandchildren near at hand, so it isn't likely that she would marry an 81 year old man unless there was some inducement other than the romantic considerations that usually lead to marriage. To quote from Hamlet, I think it's apt here, when he was upbraiding his mother for marrying his uncle so soon after his father's death, he said to her, "You cannot call it love, for at your age the heyday of the blood is tamed, it's humble, and waits upon the judgment"; so I think that's the situation here, and just as a matter of common sense and ordinary human experience, it's likely and reasonable that there was some special inducement that led this 76 year old woman in her circumstances to marry Mr. Kucks, so [118] that to that extent I think it corroborates the testimony of these witnesses, which I said I have credited.

Now, I have given this case considerable time; I've had more opportunity to do so than I do in the

case of the ordinary trial. I have read a good many authorities; counsel have been very diligent and very cooperative in the matter of submitting trial briefs and lists of authorities, and I have read all that have been submitted, and I would like to hear the argument on the question of whether this oral contract, which I say at this stage was made, is void or its enforcement barred by the statute of frauds. I thought that this preliminary statement of mine might be helpful in limiting the scope of the argument.

(Argument by counsel for the plaintiffs; further argument by counsel for the defendants.) [119]

COURT'S DECISION

The Court: Ordinarily, I think I follow a common practice of Federal judges in that respect, or Federal courts, ordinarily we're hesitant to decide a case on a motion to dismiss at the conclusion of the plaintiff's evidence without having all of the evidence brought in so that if an appeal is taken the higher court can finally decide the case and not have to send it back for a new trial.

It seems to me that there is justification for departing from that usual practice here for two reasons; first, it seems to me that all of the evidence that bears upon this question or court materially bear upon the question of whether the contract was barred by the statute of frauds is now before the Court, and nothing could be added by evidence to be

adduced by the defendants, and another reason is that this very close and I find difficult question is one purely of law which I think is fully ripe and ready for decision at this stage of the case on the facts presented so far, and if it is to be decided by a higher court, it is much to the advantage of the parties and would save them time and expense if the case goes up on a shorter record now than if the case goes up at the conclusion of the trial, when there would be, I presume, substantially more added to the record.

I might say this is one of those cases where I started out with one idea and came out with another. So far as this [120] statute of frauds is concerned and its applicability to this case, or rather its effect on this case, my first impression, and I stayed with it quite a while, was that the statute shouldn't bar enforcement of the contract. My first thought and feeling was that Mrs Schlaadt had done everything she possibly could; that she had carried out fully her part of the agreement, and certainly if the other party didn't carry it out that should be considered sufficient part performance, but I have spent a good many hours examining the authorities, and against my first impression I was obliged to come around the other way.

This case has been very well presented here. I think the Court has been fortunate in having counsel as diligent and able as they have been in this case, and I'm not trying to merely sugar-coat a bitter pill when I say Mr. Kizer has made a very persuasive

and brilliant argument here, and it was almost a marvel to me that he could make so much out of what he had to work with, and I don't see how, and I say this in all sincerity, the case could have been more effectively or more forcefully or more persuasively presented than it has been by both Mr. Kizer and Mr. Greenough.

Now, the thing that struck me as I examined these authorities was, of course, I'll say preliminarily here, of course I find and start with the premise that an oral contract was made in accordance with the testimony of the witnesses. [121] The contract runs counter to two provisions of the statute of frauds of the State of Washington, first, the provision that an agreement made in consideration of marriage is void, except mutual promise to marry, and second, an agreement to convey real property must be in writing. The contract here is unenforceable unless there is some way shown of avoiding these two bars or blocks interposed by the two provisions of the Washington statute of frauds.

In order to avoid that, it has been argued here that there is sufficient performance, there has been sufficient performance, to take the case out of the statute of frauds. Now, the thing that impressed me in looking over the authorities was, and the more diligently I searched and the harder I worked the more firmly I became convinced, that by the weight of authority, where there is a statute that bars the enforcement or renders void an oral contract to make a will devising real property, the great weight of authority is the overwhelming weight of authority, that the mere making of the will is not

sufficient performance to take the case out of the statute. I also became convinced by the weight of authority that where there is a statute such as the statute of Washington which provides that an agreement, made in consideration of marriage shall be void, that the mere consummation of the marriage is not sufficient to take the case out of the statute of frauds, and that is set out in this note in A.L.R., I don't think [122] there's one case to the contrary shown there; at any rate, the weight of authority is shown to be that way, as also set forth in the rule as stated in the Restatement of Contracts, and I'll say, too, that in my examination of the Washington cases, and of course I am bound so far as substantive law is concerned by the law of the state of Washington and by the decisions of the Supreme Court of the state of Washington, this is a diversity case, that is, one in which the jurisdiction of this court depends upon the diversity of citizenship of the parties, and as I believe Justice Frankfurter remarked in a diversity case, a Federal court is sitting in effect as another court of the state, so I decide this case in exactly the same way, or should, following the same rules of law that one of my brother judges in the Superior Court across the river would decide it if it came to them. I am bound by the laws of the state of Washington so far as substantive law is concerned. Now, a careful reading of the decisions of the Supreme Court gives me no reason to believe that the state of Washington is with the minority in either of the lines of decision which I have just discussed.

Now, it's been said that although the marriage

alone may not be sufficient, and making the will alone might not be sufficient, that the two together should be sufficient. Now, I can't get that reasoning, because it doesn't seem to me that those two things logically and reasonably should be used [123] cumulatively to add to each other or the effect of each one separately, for the reason that I think they pertain to different things. The logical basis and the rationale for the doctrine of part performance voiding the statute of frauds, as I understand it, is that where a person has acted in reliance upon the promise of another, and has substantially changed his position to his detriment, where it would be unfair and unequitable to let the other party then renounce and void the contract, that the statute will not be available as a bar to the party who tries to void it. On the other hand, on these contracts that pertain to the conveyance or devise of real property, as I understand it there, the only way in which the making of the will could be used in avoidance of the statute of frauds would be to show that there is performance on the part of the party who is to make the conveyance, and the reason why that is held not to be performance is that a will is ambulatory, it's tentative, it doesn't convey anything. It's been illustrated in this case. How can it be said that Henry Kucks performed this contract when he executed one of these wills? Which one performed it? If a contract is performed it's done, it's through, it's all finished so far as that party is concerned. It's shown here what happens to a will. A will is something we can do today that we can change tomorrow. That's exactly what Henry Kucks did.

When he made this first will, while it doesn't seem to be [124] exactly, certainly, in accordance with the contract, that couldn't be said to be performance, and the will in which he left property to the two sons of Mrs. Schlaadt was only an ambulatory temporary arrangement which could be changed at will, and was changed later on. If Henry Kucks had executed and delivered a deed in which he conveyed this property to these two boys, then we would have had a different consideration, we would have had performance, but we haven't got it, in my judgment, when he merely makes a will, which is only ambulatory.

Now, I notice in many of the cases here, I have found no case in Washington that is squarely in point, but there are some of these mentioned by Mr. Brooke, and I believe that Aiken v. English is another one, in which there was, in a case of an oral contract to make a will or convey property in consideration of marriage, that there was both the consummation of the marriage and the making of the conveyance or will, and in those cases it was held nevertheless that there wasn't sufficient part performance to take the case out of the statute of frauds. I'm quite sure that's true in Aiken v. English, the Kansas case reported in 289 Pac. 464.

Now, it's true that where there is a contract in consideration of marriage, that if there is other consideration besides the marriage, that it may be sufficient to take the oral contract out of the statute of frauds. Of course, if we just [125] think about it, we can see why the marriage itself would not be

sufficient, because the legislature of the state of Washington and other states where there is the same sort of statute, the legislature in effect has said that for reasons of public policy and because of the fact that some of the parties affected will be out of the way and not able to testify or speak for themselves when the matter is discussed in court, but at any rate, for reasons of public policy, marriage itself shall not be considered a sufficient consideration to validate an oral contract or to make an oral contract based upon it valid. In other words, they've said that if one party promises to do something in consideration of marriage, that the marriage is not sufficient to validate an oral contract. Well, if we say then that it's true that an agreement in consideration of marriage is void, but if the marriage is performed, the very thing that's contemplated by the statute, that takes it out of the statute, it would mean in effect to invalidate the statute in all those cases where the marriage was actually consummated, and that of course is an absurd conclusion, so that there must be something to take the case out of the statute of frauds, something other than the mere consummation of the marriage.

Mr. Kizer argued very persuasively on that point, but when we just cooly and calmly consider the facts in this case, it is difficult, it seems to me, to escape the conclusion that [126] Mrs. Schlaadt made only one promise, she promised to do only one thing, and that was to marry Henry Kucks. That was the testimony, and he promised, assuming that the oral

agreement was made, he promised that if she would marry him, that he would leave his property to her sons. Now, everything that she did, she did enter into the marriage, but everything else that she did was purely incidental to the marriage; it's something that a wife would be expected and be required to do. She left her home and went to live with him. What bride doesn't? She left her son and her relatives and went where he was living, but isn't that the obligation that is ordinarily imposed upon a wife? So that I can't think of anything that she did here other than entering into the marriage that she would not do, or any bride would not do, any wife would not do and be ordinarily obliged to do and presumed to do in carrying out the marriage arrangement.

One of these cases struck me here, while it's not a Washington case, as indicative of how little the courts think of that matter of a wife changing her residence to be with her husband. In this, as I remember it, Hutnack vs. Hutnack, or Hulnack, at any rate, it's a Rhode Island case that is reported in 81 Atl. 2d 278, in that case the woman was a resident of Europe, and left her home in Europe and came all the way to the United States to live with a man who promised he would do certain things if she married him, and that wasn't considered [127] part performance sufficient to take the case out of the statute of frauds.

Now, it has been argued here that after all, the marriage wasn't the principal consideration here. I think that there are some cases that mention and

say that if the marriage is incidental to some other arrangement that the parties are primarily preoccupied with and primarily interested and concerned with, that an exception will be made. I think in applying that rule, however, we have to look at the marriage from the standpoint of both the parties, and not just one of them. It may be true that from Mrs. Schlaadt's standpoint, the fact that her sons would get Mr. Kucks' property was more important to her than the marriage, but to Henry Kucks the marriage was the important thing, I assume more important than his leaving the property to the sons, so if we look at it from the standpoint of both the parties, this was a marriage contract, it could be nothing else, that is, an agreement made in consideration of marriage. That is true of practically every one of these cases, that one of the parties probably doesn't regard the marriage as highly as the other from the standpoint merely of what the marriage would bring, without the other considerations. If an elderly wealthy man promises a young woman he will give her a million dollars if she marries him, certainly the marriage may not be important to her, but it is to him. That can be said of practically every one of these [128] cases in which the question arises.

On the matter of fraud, I think I need say very little on that, as I have indicated it is my conclusion, and I can see no other conclusion that could be reached under the testimony, that Henry Kucks when he made the promise made it in good faith, that there was no fraud, no deceit, and the fact

that he did fail to carry out the agreement it seems to me is not sufficient evidence of fraud without something more, so I can't say that the statute of frauds in this case can be avoided on account of any fraud practiced upon Mrs. Schlaadt by Henry Kucks.

Now, in a case of this kind, although it doesn't seem to fit in too well, there is a requirement, as I understand it, that findings of fact be made. I think the matter is governed by rule 41 (b) of the Rules of Civil Procedure, which provides in part that after the plaintiff has completed the presentation of his evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and law the plaintiff has shown no right to relief, and so forth. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52 (a), which is the finding rule, and I mention that because in the event the case goes to a higher court, it is rather important, I think, to get the findings as I think they should be [129] or at least have them reflect my view of the evidence that's been presented here.

I think I've indicated that I find that the promise was made substantially as testified to by these witnesses, that Henry Kucks promised orally that if Mrs. Schlaadt would marry him, he would leave his property to her two sons. I find that promise was made in good faith and without any intent to

defraud or deceive Mrs. Schlaadt. I think it would be proper to make a finding that the evidence shows here as to the situation of Mrs. Schlaadt that she was living in Portland and had her own home there, and that she did leave her home in Portland and went to live with Henry Kucks in Davenport, Washington, and lived with him there until her death. I don't regard that, however, as a part of the contract, that she was to make any material change in her circumstances. I think simply, that is my view of it, that it was incidental to her marriage, but I have no objection to reciting what her situation was before the marriage was entered into, and then I think too the findings should show the making of these wills, not detailing their contents, but at least referring to them by exhibit number. If there's anything else you're in doubt about so far as the findings are concerned, we can take it up at the time of the settlement of them.

Mr. Kizer: Will it be in order for us to prepare our suggested findings for your Honor's consideration? [130]

The Court: I think that that might be wise.

Mr. Kizer: It seems so, because in certain respects you're finding with us, but on the law you're finding against us.

The Court: I think there is rather a peculiar situation here. Since I've found with the plaintiff on the facts and with the defendant on the law, perhaps it might be well for you to prepare your own version of the factual findings, and from that we should be able to work out something that would be acceptable. [131]

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify: That at all times herein mentioned I was acting as the official court reporter of the United States District Court for the Eastern District of Washington; that as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Hon. Sam M. Driver, United States District Judge, held at Spokane, Washington, on June 30 and July 1, 1952; that the within and foregoing is a full, accurate and complete transcript of the proceedings had in the above-entitled cause, excepting the argument of counsel.

Dated this 16th day of July, 1952.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed August 25, 1952. [132]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washing-

ton, do hereby certify that the documents annexed hereto are the Original

Complaint.

Notice of Motion for Leave to Amend Complaint.

Motion to Dismiss.

Motion for Leave to File Amended Answer.

Amended Answer.

Certified Copy of Clerk's Minute Entry June 27, 1952, re Motion to File Amended Answer.

Court Reporter's Record of Proceedings at the Trial.

Exhibits Admitted in the Trial.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Cost Bond on Appeal.

Appellants' Designation of Record on Appeal.

Appellees' Designation of Record on Appeal.

on file in the above-entitled cause, and that the same constitute the record for hearing of the Appeal from the Judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as called for by the appellants and the appellees in their designations of record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 19th day of September, A.D. 1952.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk of Said District Court.

[Endorsed]: No. 13554. United States Court of Appeals for the Ninth Circuit. Grover C. Schlaadt, Sr., and Garfield Schlaadt, Appellants, vs. Emil Zimmerman and Kate Zimmerman, Husband and Wife; Fred Jahnke and Emma Jahnke, Husband and Wife, and Emil Zimmerman as the Executor of the Last Will and Testament of John Henry Kucks, Deceased, Appellees. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed September 22, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13554

GROVER C. SCHLAADT, SR., and GARFIELD SCHLAADT,

Appellants,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife; FRED JAHNKE and EMMA JAHNKE, Husband and Wife, and EMIL ZIMMERMAN as the Executor of the Last Will and Testament of JOHN HENRY KUCKS, Deceased,

Appellees.

STATEMENT OF POINTS

To the above-named appellees and to Messrs. Underwood and Campbell, and Hamblen, Gilbert & Brooke, your attorneys:

You and each of you are hereby served with appellants' statement of points as follows:

1. The court erred in holding that the oral contract between Catherina Schlaadt and John Henry Kucks by the terms of which Kucks agreed to leave his property to appellants in consideration of Catherina Schlaadt's marrying him was void and unenforceable in view of the complete performance of the contract by both parties to it.

2. The court erred in holding that neither the execution of the wills dated May 24, 1945, and Feb-

ruary 11, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds.

3. The court erred in holding that defendants (appellants) were entitled to judgment against plaintiffs (appellees) dismissing this action with prejudice and costs.

4. The court erred in entering judgment on the findings in favor of appellees and against appellants.

Spokane, Washington, September 25, 1952.

/s/ BENJAMIN H. KIZER,

/s/ JOSEPH W. GREENOUGH,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 27, 1952.

No. 13554

IN THE

United States

Court of Appeals

For the Ninth Circuit

GROVER C. SCHLAADT, SR., and GARFIELD SCHLAADT,
Appellants,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife; FRED JAHNKE and EMMA JAHNKE, Husband and Wife; and EMIL ZIMMERMAN as the Executor of the Last Will and Testament of JOHN HENRY KUCKS, Deceased,
Appellees.

OPENING BRIEF OF APPELLANTS

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

BENJAMIN H. KIZER,
J. W. GREENOUGH,
Old National Bank Building,
Spokane, Washington.

GRAVES, KIZER & GRAVES
Of Counsel

THE FRANKLIN PRESS, SPOKANE

No. 13554

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Of Counsel

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STATUTES AND TEXTS

I

STATEMENT SHOWING JURISDICTION

Jurisdiction arises out of diversity of citizenship. Appellants are residents and citizens of Oregon and California, appellees of the State of Washington. The amount in controversy exceeds $3,000 exclusive of interest and costs (Findings of Fact 1 and 2, R. 15).

II

STATEMENT OF CASE

Since the trial court has found all of the facts in favor of appellants, we challenge only the conclusion of law deduced therefrom. Therefore, this statement of the case is a compressed narrative of the trial judge's findings which, for convenience of this court, are printed as Appendix 1 to this brief.

For many years Henry Kucks and wife, residents of Davenport, Washington, had been friends of Catharina Schlaadt, mother of appellants. In June 1944 Kucks, having lately lost his wife by death, visited Catharina Schlaadt at her home and there orally made her the proposition that if she would marry him he would leave, upon his death, all of his estate to her two sons, he having no heirs of his own. He made this promise to induce her to marry him (Finding of Fact 4, R. 16).

Mrs. Schlaadt had been a widow for 10 years, lived in a large well furnished home of her own in Portland, Oregon, where she had a wide circle of friends and relatives who visited her frequently, and was happily circumstanced both as to relatives and living conditions. She received devoted attention from her son Grover and wife and had near her in that city her grandson and his wife and her great-grandson (Finding of Fact 3, R. 15).

The court found that this proposition or promise of Kucks "was the special inducement that led this 76 year old woman in her comfortable circumstances to marry John Henry Kucks, then a man of 81 years of age, and that she would not have married him but for such promise" (Finding of Fact 6, R. 17).

The court further found that the evidence supporting such promise "is conclusive, definite, certain and beyond legitimate controversy. Further, this testimony finds corroboration in the subsequent conduct of John Henry Kucks in the making of the wills" hereinafter referred to (Finding of Fact 5, R. 16).

Two months thereafter on August 11, 1944, relying on the promise made to her, Catharina Schlaadt and John Henry Kucks were married and Catharina Schlaadt removed to Davenport, Washington, where John Henry Kucks resided, taking her personal and household belongings with her. There she was a dutiful wife to John Henry Kucks until her death on January 4, 1946 (Findings of Fact 7 and 8, R. 17).

After their marriage John Henry Kucks on May 24, 1945 made his will by which he left all of his property and estate to his "beloved wife, Catharina Kucks," and appointed her to be the executrix thereof under the terms of his non-intervention will (Finding of Fact 9, R. 17).

After the death of his wife, Catharina, John Henry Kucks on February 11, 1946 made a second will by which, after bequeathing $500 in trust for Gary Handel (infant son of George Handel whom Kucks and his wife had brought up to manhood), Kucks left the whole of his estate to appellants, stating that they were the sons of his deceased wife, Catharina, and appointing Grover Schlaadt the executor of this non-intervention will (Finding of Fact 11, R. 18). These are the two wills referred to by the court in its findings as corroborating the evidence of the oral promise of Kucks to leave his estate to the two sons of Catharina Schlaadt (Finding of Fact 5, R. 16). Thereafter, between October 22, 1946 and August 27, 1949 John Henry Kucks executed three other wills in which he first diminished, later omitted altogether, the provision he had directly made for appellants in his will of February 11, 1946 (Findings of Fact 12, 13 and 14, R. 18-19).

Thereafter on July 12, 1951 John Henry Kucks died and his last will of August 27, 1949 was probated whereby he left the whole of his estate to two neighbors, appellees herein, to whom he was not related in any way (Complaint par. 7, R. 5; Answer

par. 6, R. 13; Finding of Fact 15, R. 20). The appraisal of his estate disclosed assets in the State of Washington of the value of $72,552.22, not including a balance of approximately $15,000 due from sale of Canadian lands (Finding of Fact 16, R. 20).

From these findings of fact the court drew the conclusion of law which we challenge by this appeal that the agreement between John Henry Kucks and Catharina Schlaadt was void and unenforceable under the statute of frauds of the State of Washington and that neither the execution of the wills dated May 24, 1945 and February 11, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds.

III

SPECIFICATIONS OF ERRORS

1. The court erred in concluding (Conclusion of Law 1, R. 21) that the oral contract between Catharina Schlaadt and John Henry Kucks by the terms of which Kucks agreed to leave his property to appellants in consideration of Catharina Schlaadt's marrying him was void and unenforceable in view of the complete performance of the contract by both parties to it.

2. The court erred in concluding (Conclusion of Law 1, R. 21) that neither the execution of the

wills dated May 24, 1945 and February 11, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds.

3. The court erred in concluding (Conclusion of Law 2, R. 21) that defendants (appellees) were entitled to judgment against plaintiffs (appellants) dismissing this action with prejudice and costs.

4. The court erred in entering judgment on the findings in favor of appellees and against appellants.

IV

ARGUMENT

A. Preliminary Statement

Although there are four specifications of error, they raise a single issue of law: Was the performance by both parties of the promise or contract of John Henry Kucks sufficient to take the contract out of the statute of frauds and thus render it enforceable?

1. We consider first the facts upon which appellants rely as evidence of performance of this contract by both parties to it. Certain of these facts isolated and standing alone would not constitute by themselves part performance. Other of the facts do make for part performance. But taken as a whole they show the contract fully performed as follows:

(a) John Henry Kucks made the promise, as the court found, in good faith expecting Catharina to rely on it (Finding of Fact 4, R. 16).

(b) Catharina did rely on it and in the faith that he would so perform did marry him (Finding of Fact 6, R. 17).

(c) To carry out this agreement Catharina gave up the associations with her relatives and longtime friends in Portland and the comfortable home that she owned where she had been contented and happy, dismantled the furniture, furnishings and personal belongings of her home and moved them to Davenport, Washington, to live with Kucks as his dutiful wife until her death. In short, she left nothing unperformed on her part of this contract (Finding of Fact 8, R. 17).

(d) In turn, during her life as his wife Kucks left the whole of his estate to his "beloved wife," Catharina, manifestly wishing to place it in her hands to pass on to her sons should she survive him (Finding of Fact 9, R. 17).

(e) Six weeks after the death of Catharina, Kucks executed a second will leaving all of his property (save $500 in trust to the infant son of the man he and his first wife had raised from childhood) to the two sons of Catharina, just as he had agreed to do. Even the slight deviation of $500 (about 1/180 of his estate) was to go to appellants should the infant son die before reaching 21 years (Finding of Fact 11, R. 18).

Thus we see that Kucks fully performed his part of this contract during the life of Catharina and confirmed that performance after her death. We invite counsel for appellees to think of a single aspect of this contract that remained unperformed by either party to it.

Thereafter, in less than 3 years (from October 22, 1946 to August 27, 1949) Kucks executed three other wills, each quite different from the first two (Findings of Fact 12, 13 and 14, R. 18 & 19). Whether these later wills were the product of a weak and wavering will enfeebled by age (he was 84 to 87 in this period) or were the result of undue persuasion by appellees is not disclosed by the evidence and is not material here. It suffices to note that each will is in partial or complete violation of the terms of his contract with his deceased wife, the making of which has been conclusively established.

2. We recognize that this Court will determine this case in conformity with the statutes and decisions of the State of Washington. For the convenience of this court we include Washington's statutes of wills and frauds as Appendix 2 to this brief.

In considering the Washington decisions on this point we bear in mind that no two cases in this field are alike. In fact the Washington Supreme Court has many times recognized that in this field of law "Each case of the kind now before us must rest upon its own peculiar facts and circumstances."

Jennings v. d'Hooge, 25 Wn. (2d) 702, 706; 172 P. (2d) 189, 191;
In re Fischer's Estate, 196 Wash. 41, 48; 81 P. (2d) 836, 839;
Resor v. Schaefer, 193 Wash. 91, 95; 74 P. (2d) 917, 918;
Avenetti v. Brown, 158 Wash. 517, 521; 291 Pac. 469, 471;
Velikanje v. Dickman, 98 Wash. 584, 586; 168 Pac. 465, 466.

Thus we must examine a number of decisions of the Supreme Court of Washington, each of which has certain aspects similar to the case at bar, and deduce from the whole the applicable basic principles controlling the decision of this case.

B. Basic Principles

The rule of law that part or full performance of an oral contract which has been proved by evidence that is "conclusive, definite, certain and beyond all legitimate controversy" takes such a contract out of the statute of frauds and out of the statutes relating to the execution of wills or deeds is almost as old as the statute of frauds itself and is too well established to require citation of authority as to the existence of the rule.

But the circumstances under which it is held that these statutes do not apply to such oral contracts do call for an examination of the Washington cases on this subject.

A comprehensive appraisal of the decisions to be here considered discloses the following basic principles applicable to this case.

1. Unlike a number of other supreme courts, the Washington decisions disclose a liberal policy as to part performance coupled with an exacting policy as to proof of the oral contract.

2. The Washington decisions place special emphasis on the value of testimony showing that the promisor has executed a will either in full or partial conformity with the oral contract. And where the promisee has performed, though her act of performance amounts to ever so little, our decisions accept this execution of such a will as an *act of performance* which admits proof of an oral contract even when the will was later revoked by the promisor.

3. Where such an oral contract, otherwise void by these statutes, is fully performed on both sides, the Washington decisions hold that the statutes of frauds, including those pertaining to wills and deeds, do not apply.

The facts in this case, as established by the trial court's findings, measure up fully to the requirements of all three of these basic principles. We now turn to the Washington decisions to demonstrate how strongly the facts here adhere to these principles.

1. *Washington Decisions: Liberal as to Part Performance, Exacting as to Proof of an Oral Contract Otherwise Void under Statute of Frauds.*

The recent case of *Jennings v. d'Hooge,* 25 Wn. (2d) 702; 172 P. (2d) 189, relating to an oral contract to make a will, was a close case on the evi-

dence and involved a vigorous dissent. Hence, the majority of the Court undertook to review all of the oral contract cases, 37 in number, that had come before it. Of these, 12 cases had enforced such oral contracts and in 25 cases the Court had denied relief to the plaintiff, finding either that the evidence did not establish the contract with the requisite certainty or that the evidence did not tend to prove that a contract was actually entered into.

This Court will not fail to note that these 38 cases (including *Jennings v. d'Hooge, supra*) almost invariably turn on the inquiry (1) whether the evidence established the existence of a definite contract and (2) whether the proof was "conclusive, definite, certain and beyond legitimate controversy."

These questions are, of course, set at rest in favor of appellants by the findings in this case. The only inquiry with which we are concerned is whether there has been part or full performance of the oral contract admittedly made. We look to the 12 cases in which oral contracts were enforced, therefore, to see what was the part performance on which the Court granted relief. In certain of the cases the part performance was slight. In others it was more substantial. But in all of the cases it was accepted by the Court as adequate. How little it takes to satisfy

the requirement of part performance, if the proof is adequate, is shown by the following cases.

In *Coleman v. Larson,* 49 Wash. 321, 325; 95 Pac. 262, 264, decedent caused a letter to be sent to her brother saying that if the brother and his wife would be willing to make their home with her she would give them that home. The brother and his wife left from California for Seattle and thereafter resided with decedent until her death two months later. Decedent did not fully perform, though she did leave with her executor a deed to plaintiffs covering a portion of the home property. Slight as was this performance by plaintiffs, the evidence of the oral contract being satisfactory, the Court enforced the agreement. In so deciding the Court used this significant language:

> "An agreement for a gift of land will not, of course, be enforced on proof alone of the promise to give. This is true whether the promise be oral or in writing. But where the promisee accepts the promise, enters into possession and makes improvements on the land, or does some other act on the *faith of the promise which materially changes his condition,* the promisor will be required to make good the gift." (Emphasis supplied.)

The question will arise in the Court's mind at once: Was the removal from California to Seattle any greater change of condition than the removal of this aged woman from her comfortable home amidst her relatives and friends in Portland to Davenport?

In *Velikanje v. Dickman,* 98 Wash. 584, 596; 169

Pac. 465, 470, the part performance was a little more substantial. Decedent, an elderly man broken in health, offered to leave his ranch worth $25,000 to respondent, a young man of 23, if he would live with him and care for the ranch. The young man did care for him for a period of about 9 months while decedent was on the ranch in the period of a year and a half before decedent's death. By his last will decedent left this property to a nephew, making no mention in the will of respondent or of the ranch. While the services were for a short period the Court nevertheless enforced the obligation because the evidence was wholly satisfactory as to the making of the agreement. Again, the Supreme Court's language is significant:

> "Finally, it is argued that, in view of the short duration of respondent's services, they are inadequate as a consideration to sustain specific performance. But the extent of the consideration is to be measured by the breadth of the undertaking, rather than by the eventuality."

In *Alexander v. Lewes,* 104 Wash. 32, 42, 44, 46, 47; 175 Pac. 572, 576-7, decedent, a man in his 86th year, entered into an oral agreement with the husband of his recently deceased daughter that if the son-in-law would care for him until death of decedent he would leave certain property to him worth $12,000. At the time this oral agreement was made decedent drew his will which included this devise of the real estate to the son-in-law, reciting that he was greatly

indebted to him "for extreme kindness, care and attention," this because decedent had previously made his home with his son-in-law and the deceased daughter of decedent.

Decedent lived with his son-in-law only four days after making this oral agreement when he was taken away from the home by relatives with the result that there could be no further performance of the agreement by the son-in-law. A couple of days later decedent executed a new will leaving the property covered by the oral agreement to his surviving children. The trial judge refused relief, saying that:

> "Specific performance should not be enforced if it would be unconscionable or inequitable or work an injustice. To say to Alexander that he is now entitled to the $12,000, by reason of taking care of the old man for three or four days . . . it seems to me would be an entire injustice . . ."

But the Supreme Court reversed the case and granted specific performance.

It was urged by the defendants that a remembrance of past benefits plus only four days of part performance was wholly inadequate to admit oral evidence of the agreement and that plaintiff could be compensated in money for his small part performance. But the Supreme Court said:

> ". . . in the absence of fraud or overreaching, the testator, being competent, can fix upon anything that is not in itself unlawful as a consideration and put his own value upon it, whether it be greater or less . . .

> "It would be unseemly, to say the least, for us to hold the contract inequitable . . . when Frederick Lee Lewes found no inequity in his promise . . .
>
> "Courts will not ordinarily measure equities by time standards to aid one who breaks a contract . . . The case ordinarily presented is one where the promisee fails to perform. The question of substantial performance is then important. But this case rests not upon the failure of the promisee but upon the repudiation of his contract by the promisor."

We have quoted the text from this case both because the language is pertinent and because the facts have certain similarities. In both cases each decedent was in his 80's. Each man knew what he wanted and in each case the promisee did all that decedent required of him or her. Can it be said that when Catharina broke up her home in Portland, leaving behind her at the age of 76 her settled way of life, her relatives and friends and removed to Davenport, Washington, she did any less than this son-in-law with his four days' performance? Is the will in the Lewes case, in effect less than a week, any more potent evidence than the will of decedent in this case in effect through the remainder of the life of Catharina and then followed up some weeks after her death by a second will in favor of appellants?

Both cases are alike in that each decedent made the promise in good faith and with a definite intent to fulfill his promise but was later led, by considera-

tions or pressures not revealed by the testimony, to change his will, in our case long after the promisee had passed on to her reward in the full belief that her husband would fulfill his promise (Finding of Fact 10 and 14, R. 18 & 19).

In the Lewes case the equities that influenced the Supreme Court to give effect to the oral portion of the contract, as shown by the foregoing quotation, were created by the good faith intent of decedent to fulfill his bargain, evidenced by the will he drew at the time. Bearing in mind that the trial court in our case has found that decedent made this promise "for the purpose of inducing Catharina Schlaadt to marry him" and that "this proposition or promise was the *special inducement* that led this 76 year old woman in her comfortable circumstance to marry John Henry Kucks" (Findings of Fact 4 and 6, R. 16-17), we have here far stronger equities in favor of this wife and her children than existed in the Lewes case. Not only are the equities stronger, but the performance of the oral part of the contract between the parties is more complete on both sides.

In *Perkins v. Allen,* 133 Wash. 455; 233 Pac. 655, a $2600 estate was set aside as a homestead to the surviving husband. Plaintiffs, children of the deceased wife, quitclaimed their residuary interest in the estate to the husband and he promised at his death to leave it to them. He drew such a will but made a later will leaving his estate to defendants. In sustaining the oral contract to make a will the court said:

"Appellants also strenuously insist that there is no consideration shown for the alleged contract, contending that the release by respondents of any interest in their mother's estate, under the will or otherwise, was no consideration . . .

"We cannot agree with the above contention. Although the consideration may have been slight, it was sufficient to confirm D. L. Getty in the ownership and control of the entire estate, and the fact that he was getting a fee instead of a mere life estate was some additional consideration, and as we said in *Lewes* case, *supra,* the fact that the consideration was slight will not defeat the contract, since a person may contract to convey or devise his estate for any consideration which may seem to him sufficient, so long as it is valid consideration."

In *McCullough v. McCullough,* 153 Wash. 625; 280 Pac. 70, decedent, a wealthy woman, agreed with plaintiff's father, whose wife had recently died, that decedent and her husband would bring up plaintiff's 13 months old child, as their own, giving her the education and social advantages impossible to the bereaved father but easy to the wealth of decedent. In addition, at the death of decedent plaintiff was to receive by will the home of decedent and the sum of $50,000.

In training and education decedent gave plaintiff every advantage promised and some years after plaintiff came into the home of decedent a will was executed by decedent leaving $50,000 to plaintiff but making no mention of the residence. Some time before her death decedent executed a later will that

left nothing to plaintiff, although by later codicils plaintiff was given upwards of $12,000.

Since at the time of the oral contract the father of plaintiff had no longer a wife and was in meager circumstances, it seems clear that both he and plaintiff received substantial benefits, adequate to compensate them for allowing the plaintiff to be brought up by her grandaunt, so that the additional promise to leave money and house by will was at best a dubious additional circumstance that the court might have rejected because the performance of father and daughter could readily be referable to the education, support and cultural advantages gained by plaintiff by living with her grandaunt. But, as in the other cases cited above, the Supreme Court expressed no doubt as to the adequacy of performance, confining its inquiry to the question whether the plaintiff's proof of the oral contract was "conclusive, definite, certain . . . and established beyond all reasonable doubt." Finding the proof sufficient, it sustained the oral agreement.

To the same general effect:

Worden v. Worden, 96 Wash. 592, 165 Pac. 501;

Herren v. Herren, 118 Wash. 56, 203 Pac. 34;

Slavin v. Ackman, 119 Wash. 48, 204 Pac. 816;

Swingley v. Daniels, 123 Wash. 409, 212 Pac. 729;

Olsen v. Hoag, 128 Wash. 8, 221 Pac. 984;

Resor v. Schaefer, 193 Wash. 91, 74 P. (2d) 917;

Luther v. National Bank of Commerce, 2 Wn. (2d) 470, 98 P. (2d) 667;

Cummings v. Sherman, 16 Wn. (2d) 88, 92; 132 P. (2d) 998;

Southwick v. Southwick, 34 Wn. (2d) 464, 208 P. (2d) 1187.

2. *Effect in Washington of Will Executed in Pursuance of Oral Contract*

(a) *Will as Part Performance.* Our Supreme Court has several times held that the mere making of a will, with no other act of performance by either promisor or promisee, is not sufficient part performance to allow testimony of an oral contract.

In *In re Edwall's Estate,* 75 Wash. 391, 402, 405; 134 Pac. 1041, 1045, 1046, a case of reciprocal wills, the Court expressed this thought in the following language:

> ". . . We are of the opinion that these wills do not *of themselves* prove the making of any contract of mutuality on the part of the testator . . ." (p. 402)
>
> ". . . We do not think that the *mere* making of a will in pursuance of a contract required to be evidenced in writing by the statute of frauds constitutes a part performance of such a contract so as to render the same enforceable . . ." (p. 405) (Emphasis ours.)

And in *McClanahan v. McClanahan,* 77 Wash. 138, 142-3; 137 Pac. 479, 480, and in *Cavanaugh v. Cavan-*

augh, 120 Wash. 487, 495; 207 Pac. 657, 659, in each of which cases there was no part performance unless the mere making of a will could be regarded as such part performance, the Court quoted the above language that the "will of itself," the "mere" making of a will, is not part performance.

In *Worden v. Worden,* 96 Wash. 592, 165 Pac. 501, 506, the Court, citing the *McClanahan* case, supra, again repeated this limiting clause, saying:

> "While . . . the execution of a will is not sufficient *in itself* as part performance . . ., still we think the will is admissible in support of other evidence to establish the contract . . ." (p. 606) (Emphasis supplied.)

This careful repetition each time of the words "not sufficient in itself" etc. is significant, especially when we see the acceptance of the will for part performance when there is any other evidence thereof, however slight.

On the other hand, where there is other evidence of part performance in addition to the execution of a will, the Washington Supreme Court accepts the execution of a will, though later revoked, as itself a part of the performance of the oral contract. An excellent illustration of this aspect of the rule is found in *Swingley v. Daniels,* 123 Wash. 409, 416-7; 212 Pac. 729, 731, where it was said:

> "This court has many times held that an oral contract such as is here involved, while within the statute of frauds, is taken therefrom by a

> performance of the agreement. Here, there was a *complete* performance by the actual transfer of the lands in question and by the making of the *first* will by Mr. Boyce." (Emphasis ours.)

Manifestly, the Court could not recognize the making of the revoked will as *completing* the performance of the oral contract without accepting that revoked will as a *part* of the performance.

The same facts (where the Court takes into account decedent's execution of a will as part of full performance) exist in *In re Fischer's Estate,* 196 Wash. 41, 52; 81 P. (2d) 836, 840, discussed later in this brief at IV,B,3, "Full Performance of Marriage Contracts."

(b) *Will as Confirmatory Evidence.* In reviewing these cases of specific performance of such oral contracts the Washington Supreme Court in *Jennings v. d'Hooge,* supra, (25 Wn. (2d) 702, 711; 172 P. (2d) 189, 194) said of *Olsen v. Hoag,* 128 Wash. 8; 221 Pac. 984:

> "This court considered the evidence of the various witnesses but based its decision *very largely* upon the fact that the first will was made leaving the property to the appellant and *therefrom* held that the contract was an enforceable one." (Emphasis ours.)

Again, in the *Jennings v. d'Hooge* case, on the same page reviewing *Perkins v. Allen,* 133 Wash. 455, 234 Pac. 25, the Court observed:

> "Again the court based its decision largely upon the fact that a will had been made which

> was similar to the terms of the alleged contract even though the subsequent will changed the name of the beneficiary."

Yet again the *d'Hooge* opinion, at the same point, reviewing *McCullough v. McCullough,* supra (153 Wash. 625, 280 Pac. 70), comments:

> "The court in deciding the case based its decision *to a large extent* on the fact that the deceased had indicated and approved the terms of the contract by the making of the first will." (Emphasis ours.)

We invite the Court's attention to three other cases which, while not bearing on part performance, do indicate the importance the Washington Supreme Court attaches to a will executed by the promisor in pursuance of his oral agreement.

Worden v. Worden, supra (96 Wash. 592, 605; 165 Pac. 501, 506), uses the following language:

> "The will itself is strong confirmatory proof that such an agreement was entered into . . . Here the will as actually made fully corroborates the other evidence."

In *Perkins v. Allen,* supra (133 Wash. 455, 459; 234 Pac. 25, 27), speaking of a revoked will of decedent, the Court said:

> "Although not conclusive, it [the revoked will] also is corroborative of the contract itself and of its terms."

And in the late case of *Ellis v. Wadleigh,* 27 Wn. (2d) 941, 948; 182 P. (2d) 49, 53, it is noted that:

> "Proof that a will actually had been executed has been a *most important factor* in cases of this character," (Emphasis ours.)

quoting the above language from *Worden v. Worden,* supra, and citing *Olsen v. Hoag,* supra.

These cases lead us directly to the doctrine of full performance.

3. *Full performance*

(a) *The General Rule.* The rule is so well established that the statute of frauds is inapplicable to contracts which have been fully performed that we open this part of our brief by a quotation of the text from 37 Corpus Juris Secundum 738 (Statute of Frauds, section 235):

> "It is well settled that the statute of frauds applies *only* to executory contracts, and not to those which have been executed and performed completely on both sides; in such cases the rights, duties and obligations of the parties are entirely unaffected by the statute." (Emphasis ours.)

As we have seen in *Swingley v. Daniels,* supra (123 Wash. 409, 417; 212 Pac. 729, 731) this text finds support in the decisions of the Supreme Court of Washington, where not only full performance but part performance of an oral contract, which would otherwise be under the statute of frauds, is treated as taking the contract out of the ambit of the statute.

Thus, in *Worden v. Worden,* 96 Wash. 592, 608-9; 165 Pac. 501, 507, it was said:

> "The facts in this case show full performance on the part of the appellants and *attempted full performance* on the part of the decedent by the execution of the will agreed upon, although such instrument proved to be void through failure to conform to statutory requirements. . . . The law is well settled that the heirs can be compelled to specifically perform the contract of their ancestor . . ." (Emphasis ours.)

McCullough v. McCullough, 153 Wash. 625, 631; 280 Pac. 70, 72, dealt with full performance by the promisee only. The law was thus stated:

> "An oral contract to make a will, which has been *fully performed* by the person seeking to enforce it, may be enforced in equity as against the heirs, devisees or personal representatives of the deceased." (Emphasis ours.)

In *Herren v. Herren,* 118 Wash. 56, 71; 203 Pac. 34, 39, the Court found:

> ". . . the evidence brings this case within the rule that a parol agreement for the conveyance of real property will be enforced where it has been *fully performed* by the promisee."

In *Slavin v. Ackman,* 119 Wash. 48, 51; 204 Pac. 816, 818, the Court, granting specific performance of an oral agreement to give or devise real property, placed specific performance on the ground that:

> "All of the testimony shows that the contract was *completely performed* by respondent." (Emphasis ours.)

The latest case on this subject is *Southwick v. Southwick,* 34 Wn. (2d) 464, 474; 208 P. (2d) 1187,

1193. There the Washington Supreme Court, referring to the effect of partial or full performance, observes:

> "In the case of Jennings v. d'Hooge, *supra,* [25 Wn. (2d) 702, 172 P. (2d) 189] this court said . . . 'This court has held that the above statutes [statutes of frauds] *do not apply* in instances in which oral contracts are made to convey property by will *and the consideration has been fully paid'.*" (Emphasis ours.)

In re Fischer's Estate, 196 Wash. 41, 47; 81 P. (2d) 836, 838-9, uses this language:

> "Contracts to devise or bequeath property, although not favored in law, are nevertheless enforceable, if the terms of the contract, the intention of the parties, and the adequacy of consideration are established to the satisfaction of the court by the degree of proof required, and no fraud, overreaching, or other inequitable circumstances of controlling effect is shown. *Velikanje v. Dickman,* 98 Wash. 584, 168 Pac. 465; *Alexander v. Lewes,* 104 Wash. 32, 175 Pac. 572; *Andrews v. Andrews,* 116 Wash. 513, 199 Pac. 981; *Olsen v. Hoag,* 128 Wash. 8, 221 Pac. 984; *Perkins v. Allen,* 133 Wash. 455, 234 Pac. 25; *Avenetti v. Brown,* 158 Wash. 517, 291 Pac. 469; *Resor v. Schaefer,* 193 Wash. 91, 74 P. (2d) 917; *Wayman v. Miller,* 195 Wash. 457, 81 P. (2d) 501."

The opinion in *Luther v. National Bank of Commerce,* 2 Wn. (2d) 470, 480; 98 P. (2d) 667, observes:

> "The rule is definitely settled in this state that oral contracts of the character here in question, are enforceable notwithstanding the statute of frauds, if there has been either *full or part per-*

formance. Andrews v. Andrews, 116 Wash. 513, 199 Pac. 981; *In re Fischer's Estate,* 196 Wash. 41, 81 P. (2d) 836." (Emphasis supplied.)

(b) *Applicable to Marriage Contracts.* That the general rule as above stated relating to full performance is equally applicable to contracts in consideration of marriage is shown by the following quotation from 37 Corpus Juris Secundum 739:

> "Oral contracts made in consideration of marriage which have been completely executed by the parties are not affected by the statute of frauds, and the executed transaction cannot be disturbed on the ground that there is no writing. A transaction of this nature is executed when everything undertaken by the promisor in the antenuptial contract has been performed."

In the decisions of the Washington Supreme Court we have two cases involving marriage contracts. In the first of these, *In re Fischer's Estate,* 196 Wash. 41, 43, 52; 81 P. (2d) 836, 837, 840, at or before the marriage the Fischers

> "had agreed to live together as husband and wife, . . . to pool their separate properties and hold them as community property and to make mutual and reciprocal wills whereby the survivor should take and receive the entire property."

The husband had assets valued at about $1,500 and the wife had about $700 cash which after their marriage they did hold as community property. They were thrifty and in the next 20 years of their marriage they accumulated property valued at the death of

the wife at $8,050. Less than a month after their marriage, pursuant to their earlier oral agreement, husband and wife executed the reciprocal wills in favor of each other. But 12 years later the wife executed a will in favor of her sister.

Apart from the making of the wills, the only part performance of the oral agreement was the pooling of their respective assets of which the husband had $800 more than his wife. The most that can be claimed for this is that the husband "lost" one half of his excess, or $400, by this pooling. But as the husband under Washington community property law is the manager of community personal property (Sec. 26.16.03 Revised Code of Wash.; Sec. 6892 Rem. Rev. Stat.), this really meant that he had the wife's $700 of cash as well as his own property to manage, spend or invest. This pooling of assets as community property as between a beginning husband and wife, particularly when the amount is so small as the Fischers', is an invariable incident of marriages that run for 20 years and, as part performance, is certainly no more impressive than Catharina's action in breaking up her home and removing with her household furnishings to her husband's home. Thus, the language of the Washington Court in the case is especially apt. It said:

> "As to the effect of the statute of frauds, we need only state what has already been suggested by the remarks of the trial court; there was full and adequate performance of the contract by the respondent, sufficient to take it without the

> restrictions of the statute. Moreover, there was, initially, full and adequate performance by Mrs. Fischer herself, and she could not thereafter recede from the contract, even if she had desired to do so."

This again illustrates the view of the Washington Supreme Court when there is performance on both sides of the oral contract. The will, later revoked by one of the parties, is taken into account as part of full performance. The trial court inclined to the view that Catharina's giving up her established comfortable and happy home and way of life and moving with all her belongings to her husband's home was what a wife would naturally do, therefore could not be looked upon as any part of the performance of the oral contract. But assuredly the pooling of the small savings of the Fischers is just as natural and incidental to marriage as the action of Catharina.

In *Luther v. National Bank of Commerce,* 2 Wn. (2d) 470, 479, 484; 98 P. (2d) 667, 672, 673, decedent, a man of 65 suffering from angina and hardening of the arteries, orally assured plaintiff, an experienced nurse and housekeeper of 56 who made her living by operating her own hospital, that if she would give up her hospital and nursing and care for him for the rest of his life he would devise and bequeath his estate to her. Plaintiff, accepting the proposal, did dispose of her hospital and six days later married decedent at his suggestion. The court found (p. 475) that "there was no romance con-

nected with the marriage" just as in our case the court found (Finding of Fact 6, R. 17) that "This 76 year old woman would not have married him [Kucks] but for such promise" to leave his estate to her sons. Luther made no will in favor of plaintiff (except that he left her furniture worth $100 out of a $20,000 estate) and thus the Luther case is distinctly weaker than the case at bar.

Defendant urged (p. 478) that the acts of part performance were "as readily and logically referable to the marriage contract as to the contract for care and nursing" and invoked (pp. 478-9)

> "the general rule that when *part performance* is relied upon for specific *enforcement* of a contract every act of *such performance* . . . must be unequivocably and ordinarily exclusively referable to the contract . . . 58 C. J. 994, sec. 190." (Emphasis by the court.)

The Supreme Court answered this argument by admitting the premise but denying the applicability of the rule. It said at pages 479-80:

> "There is no occasion here to invoke that portion of the rule above stated which requires that the act performed 'must of itself give rise to an *inference* of the existence of the contract' because here the 'existence of the contract' was fully established by the evidence." (Emphasis by the court.)

This exception to the general rule, as stated by our Supreme Court, was definitely overlooked by the learned trial judge in this case when he declared in

his opinion that "everything else that she [Catharina] did was purely incidental to the marriage" (R. 150). So reasoned the defendant in the Luther case, only to be overruled by the Washington Supreme Court because the existence of the contract, there as here, "was fully established by the evidence."

And when defendant in the Luther case adopted from another decision the argument (p. 487) that "giving up her erstwhile employment was but an incident to the proper discharge of her duties under the contract" the Supreme Court replied (p. 487) that in so doing plaintiff had "changed the whole current of her life." This language is peculiarly applicable to the action of Catharina in breaking up her comfortable home where she had lived for a quarter of a century, in leaving behind her three generations of lineal descendents and all of her old friends, so especially valued by the aged.

Another aspect of the Luther case was likewise overlooked by the trial judge. The Washington Court said at page 484:

> "We think that another rule applicable to the facts of this case is that found in Restatement of the Law of Contracts, 110, sec. 90, as follows:
>
> " 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'

> "It seems to us that it would be a gross injustice to deny respondent the benefit of her bargain, which she performed to the letter, merely because by operation of law the services which she rendered subsequent to marriage are held to be without consideration."

This quotation from the Restatement of the Law is especially applicable to this case, for every element present in the foregoing quotation is equally well established by the findings of the trial judge. Here, too, it would be a gross injustice to Catharina and her sons to deny them the benefit of the promise that induced her to marry Kucks when she had made such a sacrifice alike of her comfort and of her association with her family and friends to achieve that benefit.

4. *Statute of Frauds Cannot be Used to Perpetrate Fraud*

Since the trial judge found in such emphatic terms that this oral contract was entered into in good faith by both parties and that the making of this oral contract is further corroborated by the execution of the two wills by John Henry Kucks and since it is also incontestably established that the oral contract has been fully performed, it is manifest that to deny relief to appellants is to use the statute of frauds for the purpose of defrauding these appellants of what had been solemnly promised to their mother. Not only the appellants but Catharina herself, who gave up the last period of her life to live away from all of those dear to her in order to earn

this estate for her children, is as completely defrauded by the use of the statute of frauds as a defense as if Kucks himself had originally intended to defraud her and had coldbloodedly made this promise never intending to keep it.

In a late case, *Mobley v. Harkins,* 14 Wn. (2d) 276, 283, 128 P. (2d) 289, 292, our Supreme Court has given its full recognition to this well established rule in the following terms:

> "The English statute of frauds was originally enacted to prevent fraud and perjury by requiring that certain enumerated agreements and conveyances be in writing. But it was soon found that the indiscriminate application of this statutory rule often had the contrary effect of actually furthering the perpetration of fraud. The courts of equity therefore developed the doctrine of equitable estoppel by reason of part performance, declaring that certain acts referable to an oral agreement would be regarded as taking that agreement out of the statute of frauds. In this way equity guards against the utilization of the statute as a means for defrauding innocent parties who have been induced or permitted to change their position, in reliance upon oral agreements within its operation. See, generally, note (1936) 101 A.L.R. 923, 935 ff., wherein the case of *Mudgett v. Clay,* 5 Wash. 103, 31 Pac. 424, is cited."

That this has always been the rule of the Supreme Court of Washington is established by the early case of *Mudgett v. Clay,* above cited, where the Washington Supreme Court said:

> ". . . Courts of equity take cognizance of cases for specific performance of verbal agreements to convey real estate, by virtue of their general jurisdiction to relieve against frauds. They exercise their jurisdiction in such cases in order to prevent a party from escaping from the obligation of his agreement, on the plea of the statute of frauds, after the other party to the contract has, in good faith, proceeded so far in the execution of the agreement, that it would be a fraud upon him to give effect to the statute . . ."

We respectfully suggest that this is as clear a case as can be found for the application of the rule that the statute of frauds cannot be used to give validity to a defense that would perpetrate a fraud.

5. *Cases Relied on by the Trial Court*

In view of the trial judge's completely favorable findings and the pertinence of the Washington cases cited herein, this brief might well close at this point. But our respect for the learned and conscientious trial judge is such that we are constrained to deal with the two cases from other states, turned up by his industry, which in our view led him astray.

In *Aiken v. English,* 289 Pac. 464 (Kansas), a stepson sued his stepfather's estate for one-half interest therein, claiming an oral agreement with his stepfather that if his mother would marry decedent and if the stepson, then 8 years old, "would give him [decedent] his love, companionship and affection" the decedent would leave one-half his estate to the stepson. At no time did the stepfather make a will

in favor of the stepson, but he did support the stepson until the stepfather's death, when the stepson was 18 years old. Thus there was nothing done on either side by way of part performance, since the marriage, *standing by itself,* could not be taken as part performance of an oral contract with which it was in nowise connected. The Kansas court refers skeptically to "this precocious plaintiff's consent to his mother's marriage" and concluded its opinion by holding "that the oral contract relied on by plaintiff lacked a valid and sufficient consideration for its support."

But even if this case had been in point the Kansas court's reference to the general rule of that state shows the danger of using cases from other jurisdictions without ascertaining that such decisions are in harmony with the law of Washington. The Kansas court, quoting from an earlier Kansas case, said (p. 466):

> "The general rule is that every parol contract concerning lands is within the statute of frauds and perjuries and unenforceable except where the performance *cannot be compensated* in damages. The fact that the consideration for the contract was to be paid in services and not in money makes no difference in the application of the rule." (Emphasis ours.)

That this is a far narrower and more rigid rule of exclusion of oral contracts than obtains in Washington is demonstrated by the following cases, in

all of which plaintiff could have been compensated in damages for much less than was recovered by specific performance:

Worden v. Worden, 96 Wash. 592, 165 Pac. 501;

Coleman v. Larson, 49 Wash. 321, 95 Pac. 262;

Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465;

Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572;

Slavin v. Ackman, 119 Wash. 48, 204 Pac. 816;

Olsen v. Hoag, 128 Wash. 8, 221 Pac. 984;

Perkins v. Allen, 133 Wash. 455, 234 Pac. 25;

Resor v. Schaefer, 193 Wash. 91, 74 P. (2d) 917;

Southwick v. Southwick, 34 Wn. (2d) 464, 208 P. (2d) 1187.

In the other case cited by the trial judge, *Hutnak v. Hutnak,* 81 A (2d) 278 (R. I.), a young woman was courted and married in Europe, in connection with which she was promised that she would be a "partner" of her husband sharing equally with him in their accumulations in this country. Accordingly, after their marriage she came from Europe with him, as scores of thousands of young women have eagerly done in recent years without any inducement other than marriage. Some years later the husband sued her for a legal separation and she countered

with her suit for specific performance. In denying relief the court held that

> "The marriage here was the main if not the sole object of the agreement. Whatever else is alleged in the bill . . . is also so indefinite and marked with such futurity as to furnish no substantial basis for equitable estoppel."

It would be superfluous to comment on the irrelevance of the Hutnak case to the case at bar.

Even if these two cases had been much closer than they are to the case at bar, they could not be relied on, coming as they do from Kansas and Rhode Island, to support the judgment of the trial judge in view of the scope of the Washington decisions here considered.

In his oral opinion, answering appellants' argument that this oral contract had been fully performed and speaking of the two wills executed by Henry Kucks in performance of his oral contract, the trial judge said (R. 148):

> "The will in which he [Kucks] left property to the two sons of Mrs. Schlaadt was only an *ambulatory* temporary arrangement which could be changed at will, and was changed later on . . . We haven't got it [performance] when he merely makes a will which is only ambulatory." (Emphasis ours.)

This overemphasis on the ambulatory nature of the will begs the question. Where the decedent has agreed to make a certain kind of will and does so,

then, although he may indeed revoke the will, he is nevertheless bound by the terms of his contract and his subsequent change of his will can have no effect. The Supreme Court of Washington has made this distinction in at least two cases.

In *Olsen v. Hoag,* supra, (128 Wash. 8, 14; 221 Pac. 984, 986) answering just such an argument as the trial judge here has made, the Court said:

> "Of course, this was a mere will and revocable at pleasure, and it was revoked by the execution of the subsequent will; yet the subsequent will could do no more than any other alienation of property, and if the property was subject to an enforceable trust, it also *could have no effect.*" (Emphasis ours.)

And the Washington Court made the same reply to the same argument in almost exactly the same words in *Perkins v. Allen,* supra, (133 Wash. 455, 459; 234 Pac. 25, 26).

V

CONCLUSION

In conclusion, we suggest that Washington decisions establish the following legal principles controlling here:

1. The Washington Supreme Court has established a most exacting rule as to the quantum of evidence necessary to establish an oral contract within the prohibition of the statute of frauds. The trial court

expressly found appellants' case fully complies with this requirement.

2. Because the Supreme Court of Washington has been so strict as to the quantum of proof of the contract, its decisions have laid much less stress upon the quantum of part performance and repeatedly have liberally accepted less evidence of part performance than is shown in this case.

3. The Supreme Court of Washington has explicitly adopted the rule laid down by the Restatement of the Law that an oral promise intended, as was Kucks', to induce action and which does induce such action is binding if justice requires that it be enforced, as do the equities in this case.

4. Our Supreme Court has accepted the principle that where a will has been executed in conformity with the terms of the oral contract and the promisee has entered upon performance of that oral contract, the execution of the will is not only potent evidence of the making of the oral contract but itself becomes a part of the performance thereof which takes the oral contract out of the prohibition of the statute of frauds.

5. Our Court has also adopted the principle, directly applicable here, that the Statute of Frauds is designed to prevent fraud, not to promote it by an "indiscriminate application" which defrauds those "who have been induced to change their position in reliance upon oral agreements within its operation."

6. And, finally, most conclusive of all, when such an oral contract has been fully performed on both sides, as we have found is the case here, the statute of frauds has no application to such contract.

We respectfully submit that the facts found by the trial judge clearly bring this case within the scope of these basic principles and require a reversal of the trial judge's judgment.

Respectfully submitted,

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APPENDIX 1

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact (R. 15-20)

1. At all times mentioned in these findings plaintiff Grover C. Schlaadt, Sr., was and is a citizen and resident of the state of Oregon and plaintiff Garfield Schlaadt was and is a citizen and resident of the state of California. At all times in these findings mentioned all of the defendants in this cause were and are citizens and residents of the state of Washington.

2. The amount in controversy in this litigation exceeds, exclusive of interest or costs, the sum of $3,000.

3. Catharina Schlaadt (after August 11, 1944, Catharina Schlaadt Kucks) was the mother of the plaintiffs herein. In the month of June, 1944, Catharina Schlaadt was a widow living in the city of Portland, Oregon. She had been a widow for ten years and lived in a large and well furnished home of her own built by her late husband for them in 1920. Her son Grover C. Schlaadt, Sr., lived on a farm 14 miles away but came into the city each day to work and two or three times each week brought with him his wife to spend the day with Catharina Schlaadt, then picking her up in the evening. In Portland lived her grandson Grover C. Schlaadt, Jr., his wife and Catharina Schlaadt's great grandson. In addition, she had a wide circle of friends and was happily circumstanced both as to relationships and as to living conditions.

4. For many years there had been an acquaintanceship or friendship between John Henry Kucks and his wife Ida Kucks, living at Davenport, Washington, and the Schlaadt family as herein described.

In the month of June, 1944, John Henry Kucks, having recently become a widower through the death of his wife, visited Catharina Schlaadt at her home in Portland and there orally made her the proposithat if she would marry him he would leave upon his death all of his estate to her two sons Grover C. Schlaadt, Sr., and Garfield Schlaadt. Said proposition was made by him for the purpose of inducing Catharina Schlaadt to marry him. This promise was made by John Henry Kucks in good faith and without intent to defraud or deceive Mrs. Schlaadt.

5. The evidence adduced on behalf of the plaintiff as to the making of this oral proposition or promise by John Henry Kucks to Catharina Schlaadt that if she would marry him he would leave the whole of his estate to her two sons Grover C. and Garfield Schlaadt is conclusive, definite, certain and beyond legitimate controversy. Further, this testimony on behalf of the plaintiffs finds corroboration in the subsequent conduct of John Henry Kucks in the making of the wills recited in paragraphs 9 and 11 herein.

6. The court finds that this proposition or promise was the special inducement that led this 76 year old woman in her comfortable circumstances to marry John Henry Kucks, then a man of 81 years of age, and that she would not have married him but for such promise. However, while the evidence is silent as to the purpose of John Henry Kucks, it is reasonably inferable that he entered into the marriage with the usual expectations entertained of marriage by a man of his age, hoping to have a wife to make and keep a home for him and to give him her care and companionship.

7. Thereafter, having weighed the advantages and benefits to her sons of the promise so made by John Henry Kucks to leave all of his property and estate to her two sons, and in consideration thereof, Catharina Schlaadt agreed and promised to marry

John Henry Kucks and on August 11, 1944, John Henry Kucks and Catharina Schlaadt were married at Vancouver, Washington.

8. Relying on said promise of John Henry Kucks to leave his estate as aforesaid Catharina Schlaadt Kucks removed her personal belongings, including her furniture, dishes, and clothing, from her home at Portland, Oregon, to the home of John Henry Kucks at Davenport, Washington, and thereafter until her death Catharina Schlaadt Kucks resided at his home at Davenport, Washington, and was a dutiful wife to John Henry Kucks.

9. Thereafter on May 24, 1945, John Henry Kucks made and executed his last will by which he left all of his property and estate to his "beloved wife, Catharina Kucks," and appointed Catharina Kucks to be the executrix of his last will under the terms of a non-intervention will.

10. On January 4, 1946, Catharina Schlaadt Kucks died intestate, leaving as her only heirs at law plaintiffs and a daughter Florence Schlaadt, all issue of a former marriage, and her husband John Henry Kucks probated her estate and succeeded to all of her property rights in the state of Washington.

11. Thereafter on February 11, 1946, the said John Henry Kucks by his last will bequeathed in trust the sum of $500 to Gary Handel (son of George Handel whom he and his wife Ida Kucks had brought up to manhood) with the provision that if he should die prior to reaching 21 years of age then the trustee should pay the amount thereof to the beneficiaries of his residuary estate. All the rest, residue and remainder of his estate by said last will John Henry Kucks gave, devised and bequeathed unto Grover C. Schlaadt an undivided 2/3 interest and unto Garfield Schlaadt an undivided 1/3 interest, stating that the said beneficiaries were the sons of his deceased wife Catharina Kucks. Furthermore, Grover C.

Schlaadt, one of the plaintiffs herein, was made executor of said last will under the terms of a non-intervention will under the laws of the state of Washington.

12. Thereafter on October 22, 1946, John Henry Kucks, then being of the age of 84 years, made another will by which the whole of his estate was divided 1/3 to Garfield Schlaadt, 1/6 to Grover C. Schlaadt, 1/6 to the defendants Fred Jahnke and Emma Jahnke, husband and wife, and 1/3 to defendants Emil Zimmerman and Kate Zimmerman, husband and wife, and further appointed Emil Zimmerman as executor of his estate under the terms of a non-intervention will under the laws of the state of Washington.

13. Thereafter, on March 2, 1948, John Henry Kucks made and executed yet another will by which he bequeathed the balance of any money due him on his death from the sale of his land in Canada, which amounted approximately to $15,000, to George Handel, whom he and his wife had brought up to manhood, and to Jerry Handel, infant son of George Handel, he bequeathed a Canadian liberty bond in the amount of $1,000. All the rest, residue and remainder of his estate John Henry Kucks gave, devised and bequeathed an undivided 1/2 interest to defendants Fred Jahnke and Emma Jahnke, husband and wife; an undivided 1/2 interest to Emil Zimmerman and Kate Zimmerman, husband and wife, and appointed Emil Zimmerman to be the executor of his last will under the terms of a non-intervention will under the laws of the state of Washington.

14. Thereafter on August 27, 1949, John Henry Kucks executed his fifth will by which he gave, devised and bequeathed the whole of his estate 1/2 thereof to defendants Emil Zimmerman and Kate Zimmerman and 1/2 thereof to defendants Fred Jahnke and Emma Jahnke. By said will also he

appointed Emil Zimmerman to be the executor of his last will under the terms of a non-intervention will under the laws of the state of Washington.

15. Thereafter on July 12, 1951, the said John Henry Kucks died in Lincoln County, Washington. Thereupon such proceedings were had that on July 17, 1951, the last will of John Henry Kucks executed as above recited on August 27, 1949, was duly admitted to probate in the superior court of the state of Washington for Lincoln County. Defendant Emil Zimmerman received letters testamentary from the said court authorizing him to act as executor of said last will and ever since said date defendant Emil Zimmerman has been and is the duly appointed, acting and qualified executor of the estate of John Henry Kucks, deceased.

16. Thereafter such further proceedings were had in said estate that an inventory of the real and personal property of said John Henry Kucks, deceased, was duly filed in the office of the clerk of the said court and property therein listed was duly appraised as of the value of $74,552.22. The major portion of the property so inventoried and appraised consisted of real estate. The balance of approximately $15,000 due from the sale of the land in Canada was not included in said inventory.

From the foregoing findings of fact the court draws its conclusions of law:

Conclusions of Law (R. 21)

I

That the oral contract entered into by and between Catharina Schlaadt and John Henry Kucks during the month of June, 1944, by the terms of which the said John Henry Kucks agreed to leave his property to the plaintiffs in consideration of the said Catharina Schlaadt marrying him, was void and unenforcible under the statute of frauds of the state

of Washington, and that neither the execution of the wills dated May 24th, 1945, and February 11th, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds.

II

That defendants are entitled to judgment against the plaintiffs dismissing the above-entitled action with prejudice together with their costs of suit.

Dated at Spokane, Washington, this 8th day of August, 1952.

/s/ SAM M. DRIVER,
District Judge.

[Endorsed]: Filed August 8, 1952.

APPENDIX 2

Requisites of Wills

Revised Code of Washington, 11.12.020:

Every will shall be in writing signed by the testator or testatrix, or by some other person under his or her direction in his or her presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator or testatrix by his or her direction or request. . . .

Statute of Frauds

Revised Code of Washington, 19.36.010:

In the following cases any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, is in writing, and signed by the party to be

charged therewith, or by some person thereunto by him lawfully authorized:

(1) Every agreement that by its terms is not to be performed in one year from the making thereof;

(2) Every special promise to answer for the debt, default, or misdoings of another person;

(3) Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

(4) Every special promise made by an executor or administrator to answer damages out of his own estate;

(5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

Revised Code of Washington, 19.36.020:

All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the existing or subsequent creditors of such person.

No. 13554

IN THE

United States

Court of Appeals

For the Ninth Circuit

GROVER C. SCHLAADT, SR., and GARFIELD SCHLAADT,
Appellants,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife; FRED JAHNKE and EMMA JAHNKE, Husband and Wife; and EMIL ZIMMERMAN as the Executor of the Last Will and Testament of JOHN HENRY KUCKS, Deceased,
Appellees.

ANSWER BRIEF OF APPELLEES

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

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PHILIP S. BROOKE,
912 Paulsen Bldg.
Spokane 1, Washington.
FLOYD J. UNDERWOOD,
Davenport, Washington.

HAMBLEN, GILBERT & BROOKE
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Of Counsel

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I

ADDITIONAL STATEMENT

Appellants' statement is confined to a summary of the findings of fact. Notwithstanding the court made the proper conclusions of law, we still wish to urge that the evidence was insufficient to support the finding that the alleged oral agreement was entered into by Catharina Schlaadt and John Henry Kucks.

The only testimony as to the alleged oral agreement was that of Arletha M. Schlaadt, wife of Grover Schlaadt, Grover Schlaadt, Jr., and his wife, Neva Schlaadt. While these witnesses were not interested to the extent of being parties to the action, they are all related to the appellants and it can hardly be gainsaid that they were not vitally interested in the outcome of the action.

Their testimony was to the effect that John Henry Kucks had said that if Catharina Schlaadt would marry him he would leave all of his property to the plaintiffs. According to Arletha Schlaadt, the deceased did not say how he was going to divide the land but later said he was going to leave the Davenport farm to Grover and the Canada land to Garfield (R. 93).

Garfield Schlaadt, Jr., testified that John Henry Kucks made the statement that if the two of them got married he would leave his property ultimately to the boys. He made no statement as to how the land was to be divided (R. 133, 138).

Neva Schlaadt also testified that she heard John Henry Kucks say that he had promised Catharina Schlaadt that if she would marry him her two boys would be left his estate but did not say how the land would be divided (R. 116, 117).

The only other testimony was with respect to statements purported to have been made by Catharina Schlaadt to the foregoing witnesses, all of which was admitted over objection of counsel for respondent and admitted by the trial court for the sole purpose of showing the state of mind of Catharina Schlaadt (R. 79, 80, 114, 116, 121, 131).

The first will made out by the decedent left all of his property to Catharina Schlaadt and none of the subsequent wills left all of his property to the appellants nor did any of them leave the Davenport property to Grover or the Canada land to Garfield (Exs. 4-8).

At the conclusion of plaintiffs' evidence, the defendants moved the court for an order dismissing the complaint on the ground and for the reason that the plaintiffs had failed to prove the allegations thereof by any substantial evidence and on the further ground that the agreement relied upon by the terms of which it is claimed the defendant agreed to devise property is void and unenforcible under the Statute of Frauds of the State of Washington, because not in writing. The motion was also urged upon the additional ground that the sole consideration of the contract was marriage and that there was not sufficient performance

of the contract to surmount the Statute of Frauds. After extended argument by counsel and examination of the authorities by the court, the motion was granted and judgment of dismissal entered based upon findings of fact and conclusions of law.

We wish to quote Conclusion of Law I which reads as follows (R. 21):

> "That the oral contract entered into by and between Catharina Schlaadt and John Henry Kucks during the month of June, 1944, by the terms of which the said John Henry Kucks agreed to leave his property to the plaintiffs in consideration of the said Catharina Schlaadt marrying him, was void and unenforcible under the statute of frauds of the State of Washington, and that neither the execution of the wills dated May 24th, 1945, and February 11th, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds."

II

ARGUMENT

A. Oral Agreement Not Established by Clear and Convincing Evidence.

We appreciate that the findings of the trial court are presumptively correct but nevertheless we do not believe that the alleged prenuptial oral agreement was established by that degree of evidence required by the Supreme Court of the State of Washington to establish such contracts.

Our understanding is that as respondents we may urge any matter appearing in the record in support of the judgment.

Lettille v. Seofield, 308 U. S. 415, 84 L. Ed. 355;
Standard Accident Ins. Co. v. Roberts (8th Circuit), 132 Fed. (2) 794;
Kansas City Life Ins. Co. v. Wells (8th Circuit), 133 Fed. (2) 224.

Respondents therefore contend that the trial court not only decided the case correctly because of the proper conclusions of law but for the further reason that the oral agreement was not established by that degree of proof required in the State of Washington.

Resor v. Schaefer, 193 Wash. 91, 74 Pac. (2) 917.

It is the law of the State of Washington that contracts to devise or bequeath property are enforcible but the Supreme Court has definitely and firmly adopted the rule that an oral promise to make a will or an oral promise to devise or bequeath property must be established by evidence *that it is conclusive, definite, certain and beyond all legitimate controversy.* (Italics ours.)

Such contracts are not favored in law and are viewed with suspicion by the courts.

Allen v. Dillard, 15 Wash. (2) 35, 129 Pac. (2) 813.

Specific performance may be granted in a proper case, but because of the great opportunity for fraud and because of the reluctance on the part of the courts to render ineffective a subsequent will of a testator, a contract to make mutual wills must be established by clear and convincing evidence.

Widman v. Maurer, 19 Wash. (2) 28, 141 Pac. (2) 135.

Oral contracts are viewed with suspicion by the courts, but enforcible if the terms of the contract, the intention of the parties and the adequacy of the consideration are established to the satisfaction of the court.

Jennings v. D'Hooge, 25 Wash. (2) 702, 172 Pac. (2) 189.

Cases of this kind are not favored and when the promise rests in parol, are even regarded with suspicion and will not be enforced except upon the strongest evidence that the contract was founded upon a valuable consideration and deliberately entered into by the deceased. The court in this case indicated that each case must rest upon its own peculiar facts and circumstances but holds that the facts appearing in formerly adjudicated cases must be a guide to the determination of each case as it comes to the courts for decision, so that there will not be different decisions on cases that are alike as to the facts. The court reviews the thirty-seven cases of the court on this subject and makes the observation that in twelve cases contracts were held to be valid and in twenty-five cases enforcement of the alleged contracts was denied.

Thomas v. Hensel, 38 Wash. (2) 457, 230 Pac. (2) 290.

In order to establish an oral contract to devise it is necessary to show by evidence that it is conclusive, definite, certain and beyond legitimate controversy:

1. That contract was entered into;
2. That services were actually performed;
3. That services were performed in reliance on the contract.

In this case recovery was denied because the court held that there had been an abandonment of the oral contract to care for decedent.

Henry v. Henry, 138 Wash. 284, 286, 244 Pac. 686, 687.

"It is useless to repeat what has been so often said in this character of cases, that the courts look upon such claims with suspicious eyes. The evasion of the statutory requirements that some evidence of such an agreement should be in writing, is not to be easily tolerated. Even a slight experience justifies the conclusion that the overwhelming majority of such claims are founded upon no greater basis than a desire to acquire property which was never intended to be so disposed. The evidence, to sustain such oral promises, we have said, must be conclusive, definite, certain and beyond all legitimate controversy. *Frederick v. Michaelson,* ante p. 55, 244 Pac. 119; *Eidinger v. Mamlock,* ante p. 276, 244 Pac. 684; *Fields v. Fields,* 137 Wash. 592, 243 Pac. 369. We are prepared to make, and are justified in making, a statement even more stringent than that, and to hold that one seeking to establish an oral contract, whereby property of the deceased is sought to be taken, must establish all the elements of the contract and a right to have it enforced beyond all reasonable doubt. Without such a rule, no estate of any considerable size is safe from claims that it has been devised and bequeathed by word of mouth."

Wayman v. Miller, 195 Wash. 457, 81 Pac. (2) 501 approves and quotes from *Henry v. Henry,* supra.

Jansen v. Campbell, 37 Wash. (2) 879, 884; 227 Pac. (2) 175, 178:

"In a subsequent case, *Jennings v. D'Hooge,* 25 Wash. (2) 702, 172 Pac. (2) 189, we held that

cases seeking specific performance of contracts to devise are not favored and, when the promise rests in parol, are even regarded with suspicion, and such a contract will not be enforced except upon the strongest evidence that it was founded upon a valuable consideration and deliberately entered into by the deceased; and it cannot be established by the acts of one party alone."

B. Contract Void Under Statute of Frauds.

Counsel for appellants apparently concede that the oral contract was void by virtue of the following provisions of the Statute of Frauds of the State of Washington.

Revised Code of Washington, Sec. 11.12.020:

"Every will shall be in writing signed by the testator or testatrix, or by some other person under his or her direction in his or her presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator or testatrix by his or her direction or request * * *."

Revised Code of Washington, Sec. 64.04.010:

"*Conveyances and encumbrances to be by deed.* Every conveyance of real estate or any interest therein, and every contract creating or evidencing an encumbrance upon real estate, shall be by deed: * * *."

Revised Code of Washington, Sec. 64.04.020:

"*Requisites of a deed.* Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized to take acknowledgments of deeds."

Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862:

> If a contract to devise real estate is void, it cannot be enforced as to the personalty either, for being void in part it is void as a whole.

In re. Edwall Estate, 75 Wash. 391, 134 Pac. 1041:

> Oral contract to devise real estate is within the statute of frauds.

In re. Tveekrem's Estate, 169 Wash. 468, 14 Pac. (2) 3:

In re. Fischer's Estate, 196 Wash. 41, 48, 81 Pac. (2) 836, 839:

> "A contract to devise real estate or to bequeath and devise both real and personal property is within the statute of frauds and to escape the nullifying effect of the statute a sufficient part performance or full performance of the contract must be shown."
>
> *Jennings v. D'Hooge,* 25 Wash. (2) 702, 172 Pac. (2) 189;
>
> *Page on Wills,* Lifetime Edition, Sec. 1716 at page 855 and Sec. 1717 at page 857.

The alleged oral contract was also void by virtue of the following provision of the Statute of Frauds of the State of Washington:

Revised Code of Washington, Sec. 19.36.010:

> "Contracts, etc., void unless in writing. In the following cases any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized:

(1) * * *;
(2) * * *;
(3) Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry";
* * *"

Koontz v. Koontz, 83 Wash. 180, 145 Pac. 201:

The court held that an understanding before marriage that when the other should die, the survivor should have no interest in the decedent's estate, was a promise made upon consideration of marriage and void under the statute of frauds unless made in writing. The court abolished any distinction between a promise made in expectation or contemplation of marriage as distinguished from a promise made upon consideration of marriage.

Rogers v. Joughin, 152 Wash. 448, 453, 277 Pac. 988, 990:

"But the agreement itself as testified to by appellant was made before marriage, and the first mutual wills were executed before marriage, and under Rem. Comp. Stat. Sec. 5825, the agreement was void, there being in this state no distinction between contemplation of marriage and consideration of marriage. *Koontz v. Koontz,* 83 Wash. 180, 145 Pac. 201."

Allen v. Dillard, 15 Wash. (2) 35, 48, 129 Pac. (2) 813, 818, quotes from *Rogers v. Joughin,* supra, to the proposition that an oral agreement to make mutual wills in consideration of marriage is void under the statute of frauds.

Page on Wills, Lifetime Edition, par. 1712, page 851, notes that marriage is sufficient consideration to sup-

port a contract to make a will but states that the State of Washington holds to the contrary and cites the case of *Wasmund v. Wasmund,* 145 Wash. 394, 260 Pac. 259.

49 Amer. Juris. par. 16, page 376:

> "*Agreements to which statute applies*: It seems to be well settled that any verbal executory promise or agreement other than mutual promises to marry, made in consideration of marriage, whether with the promisor or a third person, is embraced within the provision of the statute of frauds requiring that 'agreements made upon consideration of marriage * * * shall be in writing, and signed by the party to be charged therewith.' This rule has been applied to a great many fact situations involving promises made by one of the prospective spouses, such as promises to make a monetary settlement on an intended wife or to convey specified real property to her, promises by the prospective wife to convey property to the intended husband, promises by either to transfer bonds or negotiable instruments to the other, promises by either to execute a will in favor of the other, promises by the prospective husband to release interests in the intended wife's property, and similar promises by the prospective wife to the intended husband with reference to his property."

37 C. J. S., par. 4, page 516:

> "The various jurisdictions of this country have enacted statutes similar to the provision of the English statute of frauds that no action shall be brought to charge any person on any agreement made in consideration of marriage, unless the agreement or some memorandum or note thereof should be in writing and signed by the party to be charged therewith or some person by him lawfully authorized. With the exception of mutual promises to marry, discussed infra par. 6, such provisions apply to all oral agreements which are

> founded on a consideration of marriage, either with the promisor or with a third person, and render them unenforceable, notwithstanding other statutory provisions that all contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place."

Note: 10 A. L. R. 321, citing *Koontz v. Koontz,* 83 Wash. 180, 145 Pac. 201, supplemented in 21 A. L. R. 311.

There is no doubt but that the alleged oral agreement is void by reason of the foregoing statutes of the State of Washington. The question to be resolved is whether the marriage of Catharina Schlaadt to John Henry Kucks and the making of the wills which were subsequently revoked, constitute sufficient performance to take the contract out of the Statute of Frauds.

C. Marriage Not Sufficient Performance to Remove Bar of Statute.

The only oral agreement as alleged in the complaint and as found by the court is that in consideration of John Henry Kucks agreeing to leave all of his property to her two sons, Catharina Schlaadt agreed and promised to marry him which she did on August 11th, 1944. (R. 4, 16.)

We quote from the testimony of Neva Schlaadt, the daughter-in-law, as follows: (R. 121.)

> "Q. And the sole proposition was that if she would marry him he would leave his property to the two boys?
>
> A. Yes, that's right.

Q. And did he say how it would be divided?

A. No, he didn't tell us that.

Q. And that was the entire agreement, was it, Mrs. Schlaadt?

A. Yes."

Counsel for appellant also stipulated that the sole consideration for the agreement was the marriage and the other matters that would necessarily follow therefrom. (R. 121-22.)

"Q. And then once again you heard that same—

Mr. Greenough: We'll stipulate, if your Honor please, that's all we claim, that was his offer, that he would leave his property upon his death to the two boys, and didn't specify in that offer any mode of division between the two of them; that's stipulated.

Mr. Brooke: Then you're stipulating also that the sole consideration was her promise to marry him?

Mr. Greenough: Her marriage to him.

Mr. Brooke: Yes. Are you stipulating that, too?

Mr. Greenough: Well, her marriage to him, and the attendant circumstances, that she left Portland, Oregon, in a comfortable home and happy circumstances and went up to a comparatively strange community; all that follows, necessarily, her marriage. We'll stipulate that."

From the foregoing, it is apparent that the only obligation that Catharina Schlaadt undertook was to marry the said John Henry Kucks and to do whatever was necessary incidental to the consummation of the marriage. It is true she left her home in Portland, moved into the home of John Henry Kucks which he

had maintained for a great number of years in Davenport, Washington. She took with her some of her furniture and personal belongings from Portland, Oregon, to supplement that which John Henry Kucks already owned and apparently had been sufficient for his own needs and that of his former wife for a great number of years. (R. 65, 82.)

We wish to quote from the court's opinion as follows: (R. 149.)

> "Mr. Kizer argued very persuasively on that point, but when we just cooly and calmly consider the facts in this case, it is difficult, it seems to me, to escape the conclusion that Mrs. Schlaadt made only one promise, she promised to do only one thing, and that was to marry Henry Kucks. That was the testimony, and he promised, assuming that the oral agreement was made, he promised that if she would marry him, that he would leave his property to her sons. Now, everything that she did, she did enter into the marriage, but everything else that she did was purely incidental to the marriage; it's something that a wife would be expected and be required to do. She left her home and went to live with him. What bride doesn't? She left her son and her relatives and went where he was living, but isn't that the obligation that is ordinarily imposed upon a wife? So that I can't think of anything that she did here other than entering into the marriage that she would not do, or any bride would not do, any wife would not do and be ordinarily obliged to do and presumed to do in carrying out the marriage arrangement."

The great weight of authority including the State of Washington, indisputably holds that the consummation of the marriage is insufficient performance to

surmount the statute of frauds. With respect to this proposition, the trial court in his opinion said:

> "I also became convinced by the weight of authority that where there is a statute such as the statute of Washington which provides that an agreement, made in consideration of marriage shall be void, that the mere consummation of the marriage is not sufficient to take the case out of the statute of frauds, and that is set out in this note in A. L. R. I don't think there's one case to the contrary shown there; at any rate, the weight of authority is shown to be that way, as also set forth in the rule as stated in the Restatement of Contracts, and I'll say, too, that in my examination of the Washington cases, and of course I am bound so far as substantive law is concerned by the law of the State of Washington and by the decisions of the Supreme Court of the State of Washington, this is a diversity case, that is, one in which the jurisdiction of this court depends upon the diversity of citizenship of the parties, and as I believe Justice Frankfurter remarked in a diversity case, a Federal court is sitting in effect as another court of the state, so I decide this case in exactly the same way, or should, following the same rules of law that one of my brother judges in the Superior Court across the river would decide it if it came to them. I am bound by the laws of the State of Washington so far as substantive law is concerned. Now, a careful reading of the decisions of the Supreme Court gives me no reason to believe that the State of Washington is with the minority in either of the lines of decision which I have just discussed." (R. 146.)

The reason for the rule that marriage is insufficient performance to take an oral contract out of the statute of frauds is that if marriage were held to be sufficient performance to remove the bar of the statute, then

there would be an end to the statute and every parol contract followed by marriage would be binding.

Manning v. Riley (N. J.), 27 Atl. 810.

In *Jones v. Williams* (Vt.), 109 Atl. 803, the court quotes at page 806 from Lord Cranworth in *Canton v. Canton,* L. R. 1 C. H. 137, as follows:

> "That marriage in itself is no part performance within the rule of equity is certain. Marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity."

Finch v. Finch, 10 Ohio 510:

> "It has long been settled that in the absence of actual fraud the fact of marriage is not such a performance as will take an agreement made 'upon consideration of marriage' out of the statute, otherwise the statute would be rendered wholly nugatory; for so far as the fact of marriage is concerned, such agreements are always performed before they become the subject of judicial consideration; and so no case would ever be within the statute."

The trial court reiterated the reasoning set forth in the foregoing cases, in his opinion, as follows: (R. 149.)

> "Well, if we say then that it's true that an agreement in consideration of marriage is void, but if the marriage is performed, the very thing that's contemplated by the statute, that takes it out of the statute, it would mean in effect to invalidate the statute in all those cases where the marriage was actually consummated, and that of course is an absurd conclusion, so that there must be something to take the case out of the statute of frauds, something other than the mere consummation of the marriage."

Note 48 A. L. R. 1356.

"The subsequent marriage of the parties, it has almost invariably been held, is not such part performance as to take an agreement in consideration of marriage, out of the operation of the statute of frauds."

49 Amer. Juris. par. 520, page 819.

"Marriage alone does not take an oral contract to bequeath property out of the statute, which provides that no action shall be brought upon an oral agreement made on consideration of marriage except a mutual contract to marry. Neither does marriage alone take a contract to bequeath property out of a statute providing that no action shall be brought upon an agreement to devise or bequeath property, or to make any provision for any person by will, unless the same is in writing properly subscribed."

49 Amer. Juris. par. 495, at page 796:

"The subsequent marriage of the parties, it has almost invariably been held, does not take an agreement made in consideration of marriage out of the operation of the statute of frauds. Such result is sustained by some authorities on the ground that the doctrine of part performance does not extend to antenuptial parol agreements in consideration of marriage. The same result is reached by other authorities on the ground that marriage alone is not a sufficient part performance of such an agreement. The position taken by the latter authorities is that marriage does not remove an oral promise from the provision of the statute, which declares that a promise in consideration of marriage is not binding unless in writing, since a promise in anticipation of marriage followed by a marriage is the exact case contemplated by the statute. It is said that an express exclusion in the clause of the statute of frauds, which requires a contract in consideration of marriage to be in writing, of mutual promises to marry leaves no

room for a construction that marriage should take such a contract out of the statute."

37 C. J. S. par. 249, at page 758:

"Contracts in consideration of marriage are not taken out of the statute by part performance as by marriage or compliance with other provisions of the contract, even where the contract relates to real property, although there are cases to the contrary."

37 C. J. S. par. 5, at page 517:

"Distinction between agreements in consideration of marriage and in contemplation of marriage repudiated in some states including the State of Washington." Citing *Rogers v. Joughin,* 152 Wash. 448, 277 Pac. 988.

Restatement of the Law on Contracts, Vol. I, par. 192, page 251:

"Topic 3. Contracts Within Class III of Par. 178. (Contracts in Consideration of Marriage.) Par. 192. Promises in Consideration of Marriage, Other Than Mutual Promises to Marry.

"Any promise for which the whole consideration or part of the consideration is either marriage or a promise of marriage is within Class III of par. 178, except mutual promises of two persons that are exclusively engagements to marry each other. * * *

Illustrations:

1. A promises to marry B and, in consideration of A's promise, B orally promises to marry A and to settle Blackacre upon A. The promise to make a settlement is within Class III, and remains unenforceable though the marriage takes place on the faith of the promise.

2. A, to induce B to accept his offer of marriage, promises B orally to make a settlement upon her. B accepts the offer. Both promises to marry, as well as A's promise to make a settlement, are unenforceable.

3. A promises to marry B and, in consideration of A's promise, B orally promises to marry A and forego the rights which the law allows B with reference to A's property. B's promise to forego such right is within Class III, and remains unenforceable though the marriage takes place on the faith of the promise.

4. A, in consideration of B's marrying C orally promises B a settlement. Though the marriage takes place A's promise is unenforceable."

Page, Lifetime Edition, Vol. IV, par. 1721, at page 869:

> "If an oral contract to make a will is entered into in consideration of marriage, marriage is not such part performance as takes the case out of the operation of the statute of frauds."

WASHINGTON CASES RE MARRIAGE

The Supreme Court of the State of Washington has always followed the majority rule since this matter was first considered by it, in the case of *Koontz v. Koontz,* 83 Wash. 180, 145 Pac. 201.

In this case it was sought to be shown by parol testimony that appellant and respondent had an express agreement prior to marriage that when either should die the survivor would have no interest in the decedent's estate. The court held that the agreement was subject to the bar of the statute of frauds notwith-

standing the subsequent marriage of the parties inasmuch as the sole inducement for the agreement was the promise of marriage. This case has been cited with approval in the following Washington cases:

In re Martins Estate, 127 Wash. 44, 49, 219 Pac. 838, 839;

Rogers v. Joughin, 152 Wash. 448, 453, 277 Pac. 988, 990.

That marriage is insufficient to take an oral contract to devise property out of the statute of frauds is also recognized *In re. Fischer's Estate,* 196 Wash. 41, 81 Pac. (2) 836, and in *Luther v. National Bank of Commerce,* 2 Wash. (2) 470, 98 Pac. (2) 667.

The contracts in these two cases were upheld, however, because in the first case there was good and valuable consideration apart from the marriage and in the second case the court expressly held that marriage was not even contemplated by the parties when the contract was made.

Were we to cite all of the cases from other jurisdictions to this proposition, respondent's brief would be endless, so we will confine ourselves to several leading cases exactly in point and which cannot be distinguished from the case at hand:

Fischer v. Fischer (Neb.), 184 N. W. 116.

This was an action to compel the specific performance of an antenuptial agreement which plaintiff claims was made by his mother, Margaret Fischer, with Gothardt Fischer, who was a widower with five children. In consideration of plaintiff's mother mar-

rying Gothardt and taking care of his children, it was understood that Gothardt would make plaintiff an equal heir with his minor children.

The statute involved requiring a contract in consideration of marriage to be in writing is identical with the Washington statute, supra.

Plaintiff contended that the marriage was not the sole consideration for the contract in that there was no duty on the part of Mrs. Fischer to care for the children of Gothardt and when fully performed and carried out was sufficient consideration apart from the marriage. In repudiating this contention, the court at page 119 said:

> "We are clearly of the opinion that the agreement of plaintiff's mother to care for and be a mother to the minor children of Gothardt Fischer furnishes no good or valuable consideration for the contract; but, if it did, it was so connected with the contract of marriage as to make the contract an entirety, and so may not be considered an outside or independent consideration."

Aiken v. English (Kans.), 289 Pac. 464.

The oral contract provided that if decedent would marry plaintiff's mother and bring plaintiff into his home, plaintiff would give him his love, affection and companionship and decedent would leave plaintiff one-half of his property. After the marriage plaintiff went into the home of decedent, gave him his love, affection and companionship and fully performed all of the terms of the contract.

The Court cites and approves *Fischer v. Fischer,*

supra, and in sustaining a demurrer to the complaint, used the following language at page 466:

"The oral consent of plaintiff to his mother's marriage to Westgate added nothing to the validity of the agreement of his mother and Westgate to marry; and no precedent is cited and we have discovered none which holds that an oral promise to devise property to a third party in consideration of marriage can be enforced. On the contrary, in the well-considered case of *Fischer v. Fischer,* 106 Neb. 477, 184 N. W. 116, 21 A. L. R. 306, it was held * * *"

Hutnak v. Hutnak (R. I.), 81 Atl. (2) 278.

Antenuptial agreement by husband that if wife would marry him and come to the United States from Europe everything they should accumulate should belong to them, not enforcible because marriage was the main if not the sole object of the agreement.

Alexander v. Alexander (N. J.), 124 Atl. 523, at page 524:

"I find nothing in the agreement set forth in the counterclaim, against which this motion is directed, to remove it from the operation of our statute. It was a parol agreement upon the part of defendant, now the wife, that if counterclaimant, her present husband, would marry her at an early date she would, after marriage, apply her income and property to the personal expenses of herself and her husband. It was a parol promise made by her in consideration of marriage; a promise made to induce counterclaimant to marry her. The circumstance that counterclaimant by the marriage may have sacrificed his business prospects or suffered other detriments renders the contract no less one made by defendant in consideration of marriage. Since her promise was made solely in consideration of marriage no element of consideration based upon detriment suffered by him

> can change that plain fact. It is that fact that renders her promise unenforceable."

This case quotes from *Koontz v. Koontz,* 83 Wash. 180, 145 Pac. 201.

Mallett v. Grunke (Neb.), 185 N. W. 310.

Action to enforce specific performance of an alleged oral contract by which plaintiff was to give care and companionship to Louis Kienbaum now deceased in consideration of which she was to receive all his estate. Plaintiff made arrangements to sell her home in Omaha where she lived and moved some of her canned goods and other personal property to Snyder where the deceased resided. We quote from page 311 of the opinion:

> "From a careful reading and analysis of the testimony given by the witnesses for the plaintiff alone we have come to the conclusion that it is overwhelmingly shown that the agreement was an entirety and that it contemplated marriage as its necessary and pivotal feature."

Adams v. Adams (Oregon), 20 Pac. 633.

Court in holding marriage not sufficient part performance of the oral contract said at page 637:

> "But that the parties entered into an agreement whereby the said William agreed to give the appellant the use of the premises for her home during her life, in consideration of her marrying him, is hardly sustained by the testimony. Nor is it shown that any such agreement was sufficiently performed to take the case out of the statute. She did nothing, that I can discover, aside from the marrying, except to go and live upon the premises as William Adams' wife."

Brought v. Howard (Ariz.), 249 Pac. 76.

> "It has been passed upon many times by the courts and the holdings have been all but unanimous to the effect that if the only consideration of an agreement is marriage it must be reduced to writing and signed by the party to be charged. Subsequent marriage will not take such a contract out of the statute. The reason for this exception to the general rule is variously stated, but the clearest and fullest statement is found in *Hunt v. Hunt,* 171 N. Y. 396, 64 N. E. 159, 59 L. R. A. 306, wherein the court, after quoting the statute, said: * * *"

Catharina Schlaadt did nothing that was not incidental to the consummation of the marriage and it is therefore apparent from the foregoing authorities that there was no performance sufficient to remove the ban of the statute of frauds.

APPELLANTS AUTHORITIES RE MARRIAGE AS PERFORMANCE

In all of the cases cited by appellants there was a valid consideration other than marriage or the execution of a will.

In *re. Fischer's Estate,* 196 Wash. 41, 81 Pac. (2) 836.

The court held that there was sufficient consideration apart from the marriage in that the husband relinquished his separate property amounting to $1500.00 to the community. As pointed out in *Alexander v. Lewes,* 104 Wash. 32, 175 Pac. 572, it is not the quantity but the character of the consideration that controls.

Swingley v. Daniels, 123 Wash. 409, 212 Pac. 729.

Deeds were executed and delivered in complete performance of the contract.

Warden v. Warden, 96 Wash. 592, 165 Pac. 501.

No marriage involved. Court held sufficient performance because nephew went into possession of the land, cleared and cultivated the same, made permanent improvements and boarded and cared for a man suffering from disease.

McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70.

In this case, a father released his daughter to decedent who agreed to adopt and care for his child and bequeath to her the sum of $50,000.00. The father carried out his part of the agreement and the court held there was sufficient performance. No marriage involved.

Herren v. Herren, 118 Wash. 56, 203 Pac. 34.

This case did not involve marriage of the parties and the court simply held that there was sufficient performance by a son who had worked and managed the farm in reliance upon a deed which was duly executed by the husband, conveying an undivided one-half interest.

Slavin v. Ackman, 119 Wash. 48, 204 Pac. 816.

The court held the contract was fully performed because the promisee went into complete possession of the property and made valuable improvements. Marriage was not involved.

Southwick v. Southwick, 34 Wash. (2) 464, 208 Pac. (2) 1187.

Plaintiffs agreed to leave their home in Duluth, Minnesota, and come to the State of Washington to assist in caring for Mr. and Mrs. Sugnet as long as they should live, in consideration of a promise by the Sugnets to leave all of their property to the plaintiffs. Plaintiffs carried out their contract; Sugnet did not bequeath his property to them as agreed. Court properly held that there was full performance of the contract. Marriage not involved.

Perkins v. Allen, 133 Wash. 455, 234 Pac. 25.

The court held valid consideration in that children released interest in their mother's estate to their stepfather. No marriage involved.

Luther v. National Bank of Commerce, 2 Wash. (2) 470, 98 Pac. (2) 667.

In this case marriage did not enter into the agreement. We wish to quote from page 477:

> "As shown by the findings above quoted, respondent agreed (1) to give up her hospital; (2) to nurse and care for decedent the rest of his life; and (3) never to send him to a hospital should his condition become worse, but always to nurse him at home. In return, decedent agreed (1) to build her a 'nice' home and thereafter deed it to her; (2) to provide her a good living; and (3) in case he should predecease her to devise and bequeath to her all the property of which he should die possessed, with the exception of certain nominal bequests."

The court in recognizing the rule that marriage is not a sufficient consideration, stated at page 479:

> *"When respondent disposed of her business, dismissed her patients, and refunded their money, as she was required to do, she performed a substantial part of her agreement.* There is no occasion here to invoke that portion of the rule above stated which requires that the act performed 'must of itself give rise to an inference of the existence of the contract,' because here the 'existence of the contract' was fully established by the evidence, and, unquestionably, the act of disposing of her business was done exclusively in pursuance of the contract, and of it alone, *for at that time nothing had been agreed, or even suggested, concerning a possible marriage between the parties.*" (Italics ours.)

Cummings v. Sherman, 16 Wash. 88, 132 Pac. (2) 998.

In this case the mutual wills referred to each other and the survivor probated her husband's estate and took under the will. No marriage involved.

Coleman v. Larson, 49 Wash. 321, 95 Pac. 262.

Promisee entered into possession and made improvements on the land.

Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465.

Promisee nursed and cared for decedent with a serious illness as long as he lived. No marriage involved.

Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572.

Court points out that the character of the consideration and not the quantity of the consideration is the all important factor in determining whether or not there was sufficient part performance. In this case the court held that there was sufficient performance by the ren-

dition of personal services and the acceptance of a written contract. No marriage involved.

Resor v. Schaefer, 193 Wash. 91, 74 Pac. (2) 917.

Promisee had fully performed by caring for an elderly man. No marriage involved.

Olson v. Hoag, 128 Wash. 8, 221 Pac. 984.

This case involved the maintenance and care of a sick person in consideration of oral agreement to devise property.

D. Execution of Will Not Sufficient Performance.

Catharina Schlaadt and John Henry Kucks were married August 11, 1944, and on May 24, 1945, John Henry Kucks made and executed his last will and testament leaving all of his property to his wife. No mention was made in this will of the plaintiffs or their sister Florence Schlaadt. (R. 17, Ex. 4.)

Had this will remained in effect the plaintiffs would not have been entitled to take under its terms inasmuch as their mother predeceased the testator so it is illogical to say that this will was executed in performance of the alleged contract.

Revised code of Washington, Sec. 11.12.110.

> "When any estate is devised to any child, grandchild, or other relative of the testator, and such devisee or legatee dies before the testator, having lineal descendants, such descendants shall take the estate, real and personal, as such devisee or legatee would have done in case he had survived the tes-

tator. A spouse is not a relative under the provisions of this section."

In re. Renton's Estate, 10 Wash. 533, 39 Pac. 145.

Wife not a relative of her husband within this section and where wife named as beneficiary in her husband's will, dies before the testator, her children by a former marriage would not take under the will.

Thereafter, on February 11, 1946, after the death of Catharina Schlaadt Kucks, John Henry Kucks made a will leaving $500 to Gary Handel and devised two-thirds of his property to Grover C. Schlaadt and one-third to Garfield Schlaadt. (R. 18, Ex. 5.)

On October 22, 1946, John Henry Kucks made another will leaving one-third of his estate to Garfield Schlaadt, one-sixth to Grover C. Schlaadt, one-sixth to the defendants Fred Jahnke and Emma Jahnke, and one-third to the defendants Emil Zimmerman and Kate Zimmerman. (R. 19, Ex. 6.)

On March 2, 1948, he bequeathed the balance due from the sale of his Canada land of approximately $15,000.00 to George Handel, a $1,000.00 bond to Jerry Handel and the balance to the respondents. (R. 19, Ex. 7.)

By his last will dated August 27, 1949, he devised all of his property to the respondents. (R. 19, Ex. 8.)

According to the testimony, Grover Schlaadt was to have the Davenport farm which constituted by far the largest part of the estate, and Garfield was to receive the Canada land. None of the foregoing wills

followed this pattern so we do not see how it can be urged that the wills were executed pursuant to the terms of the oral agreement. (R. 82, 84, 88, 91, 93.)

Granted that the wills were executed in fulfillment of the alleged contract nevertheless the universal weight of authority is that the execution of a will pursuant to the terms of an oral agreement is not sufficient performance of the contract to remove the bar of the statute of frauds.

We quote from the court's opinion:

> "Now, the thing that impressed me in looking over the authorities was, and the more diligently I searched and the harder I worked the more firmly I became convinced, that by the weight of authority, where there is a statute that bars the enforcement or renders void an oral contract to make a will devising real property, the great weight of authority is the overwhelming weight of authority, that the mere making of the will is not sufficient performance to take the case out of the statute." (R. 145.)

37 *C. J. S.*, par. 250 at page 762.

> "*Contracts to make a will or not to revoke a will.*
>
> Although an oral contract to make a will or not to revoke a will may be enforced if there has been a change in position of the parties, other than through marriage, the execution of the will is not such part performance as will take out of the statute of frauds an oral agreement to make a will or not to revoke a will."

The note to this text, 95 at page 762, cites the following Washington cases:

> *In re. Gulstine's Estate,* 154 Wash. 675, 282 Pac. 920;

Cavanaugh v. Cavanaugh, 120 Wash. 487, 207 Pac. 657.

Note 48 *A. L. R.* 1356 at 1361.

"It has been held that the execution of a will pursuant to a verbal agreement in consideration of marriage is not such part performance of the agreement as will take it out of the Statute of Frauds."

In re. Edwall's Estate, 75 Wash. 391, 405, 134 Pac. 1041, 1046:

"The record furnishes no evidence whatever of part performance, unless we regard the mere execution of the wills by both testators as performance. We do not think that the mere making of a will in pursuance of a contract required to be evidenced in writing by the statute of frauds, constitutes a part performance of such a contract so as to render the same enforceable. In *Gould v. Mansfield,* 103 Mass. 408, 4 Am. Rep. 573, answering a similar contention, the court said:

'There has been no part performance which amounts to anything. The plaintiff says she made a will devising her property to Nancy. But such an instrument was ambulatory, and might have been revoked by various acts, or by implication of law from subsequent changes in the condition or circumstances of the testator. Gen. Sts. c. 92, par. 11. The plaintiff's property is still, as it has always been, in her own hands, and subject to her own control.'

"The decision of this court in *Swash v. Sharpstein,* 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796, is in harmony with this view. We conclude that there has been no such part performance as to enable us to recognize the contract under which appellant claims."

Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862.

The court held that a parol agreement to convey real estate by will made in settlement of a lawsuit was not enforcible under the Statute of Frauds when there had been no act of part performance other than the execution of a will.

McClanahan v. McClanahan, 77 Wash. 138, 143, 137 Pac. 479, 480.

"Then, in the Edwall case, after considering the claim of the appellant that there had been a part performance of the contract relied upon, we held that the making of a will in pursuance of a contract required by the statute of frauds to be evidenced by a writing, did not constitute a part performance of such contract so as to render the same enforceable, and concluded by saying: * * *"

Stevenson v. Pantaleone (Cal.) 21 Pac. (2) 703, at page 705:

" 'There has been no part performance which amounts to anything. The plaintiff says she made a will devising her property to Nancy. But such an instrument was ambulatory, and might have been revoked by various acts or by implication of law from subsequent changes in the condition or circumstances of the testator. * * * The plaintiff's property is still, as it has always been, in her own hands, and subject to her own control.' See, also, *In re. Edwall's Estate,* 75 Wash. 391, 134 Pac. 1041; *McClanahan v. McClanahan,* 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915 A, 461."

APPELLANTS' AUTHORITIES RE. EXECUTION OF WILL

In re. Edwall's Estate, 75 Wash. 391, 134 Pac. 1041.

In this case not only were mutual wills executed but deeds were also executed with the view that the deed of

the one to die first was to become effective. The court held that neither the execution of the deeds nor the wills constituted part performance of the contract.

McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479.

The court definitely held that the making of the will did not constitute such performance as to render the contract enforcible.

Cavanaugh v. Cavanaugh, 120 Wash. 487, 207 Pac. 657.

In this case it was held that a verbal contract to compensate a son for services by the making of a will devising real estate was not such part performance as to take the case out of the statute of frauds.

Warden v. Warden, 96 Wash. 592, 165 Pac. 501.

Part performance held sufficient in this case because the plaintiff not only went into possession of the land, cleared and cultivated it and made permanent improvements, but he boarded and cared for an aged man suffering with a disease, all under a direct promise that he should have the land at the old man's death.

Swingley v. Daniels, 123 Wash. 409, 212 Pac. 729.

The court held that there was a complete performance of the contract because not only was there a will but there was a complete transfer of the lands in question by deed.

In re. Fischer's Estate, 196 Wash. 41, 81 Pac. (2) 836.

In this case the husband relinquished his separate property to his wife and also made his will. The court properly held that there was sufficient performance of the oral contract.

A reading of the foregoing cases will indicate that in all of them there was a substantial performance of the contract in addition to the making of the will.

E. Marriage and Execution of Will Insufficient Performance.

Appellant contends that while neither the marriage nor the making of the will standing alone would constitute sufficient performance, nevertheless the two together should be sufficient performance. In reply to this contention the court said:

> "Now, it's been said that although the marriage alone may not be sufficient, and making the will alone might not be sufficient, that the two together should be sufficient. Now, I can't get that reasoning, because it doesn't seem to me that those two things logically and reasonably should be used cumulatively to add to each other or the effect of each one separately, for the reason that I think they pertain to different things." (R. 146, 147.)

Counsel for appellant have not cited a single authority in support of this contention and in all of the following cases it was held that both marriage and the execution of the will did not constitute sufficient performance to lift the ban of the statute.

The case of *Hughes v. Hughes* (Cal.), 193 Pac. 144 is exactly in point.

The defendant promised that if the plaintiff would marry him he would execute and deliver to her his last will and testament devising and bequeating certain real and personal property to her. The parties were married and he executed and delivered to her a will in accordance with the oral agreement. The court held that neither the marriage nor the execution of the will was sufficient performance to take the contract out of the statute.

At page 145:

> "The subsequent making of defendant's will, in favor of the plaintiff, following the marriage, was not such part performance of the oral agreement to make such will as to take the alleged contract out of the statute of frauds. *Gould v. Mansfield,* 103 Mass. 408, 409, 4 Am. Rep. 573; *Swash v. Sharpstein,* 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796; *In re. Edwall's Estate,* 75 Wash. 391, 134 Pac. 1041, 1046; *McClanahan v. McClanahan,* 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 461."

Stevenson v. Pantaleone (Cal.) 21 Pac. (2) 703.

Cites Washington cases and holds that the consummation of the marriage and the husband's naming of the wife as beneficiary in his life insurance policy insufficient part performance of oral antenuptial agreement.

Brought v. Howard (Ariz.), 249 Pac. 76.

Equitable action to compel the specific performance of an alleged agreement whereby it was claimed parties agreed to make their wills so that the one first to die should leave all of his or her property to the other. The parties married and wills were executed. The husband subsequently changed his will. The court held that nei-

their the marriage or the execution of the will lifted the ban of the statute of frauds.

Tellez v. Tellez (N. M.), 186 Pac. (2) 390.

Marriage to decedent and making of will pursuant to oral agreement held not to be a sufficient part performance of contract to relieve the same from the operation of the statute of frauds.

Anglemire v. Policemens Benefit Assn. (Ill.), 22 N. E. (2) 713.

Parol promise that if plaintiff would marry defendant, he would name her as beneficiary in certificate of benefit of Association, void under Statute of Frauds. At page 715:

> "Promise of marriage, followed by the marriage, is the exact situation contemplated by the statute. The marriage adds nothing to the circumstances set out by the statutory provision which makes a writing essential. The promise in itself being a nullity, produces no obligation, and any subsequent act of the husband following the marriage must be considered as purely voluntary. Thus, the agreement being void under the statute of frauds, the act of the husband after marriage even though in view of such agreement, must be deemed to be without legal consideration to support it, and as above said, stands therefore upon the same basis as if such act were purely voluntary. Hence the insured had the right to change the beneficiary in the policy as provided by the constitution and by-laws of the Association."

The case of *Busque v. Marcou* (Maine), 86 Atl. (2) 873, decided March 7, 1952, is well worth considering as it is exactly in point, refers to many of the forego-

ing cases and irrefutably answers all of the contentions raised by the appellants.

Prior to their marriage the defendant Joseph Busque agreed with Aurelie Busque that if she would marry him he would execute a last will and testament bequeathing all of his estate to her. Joseph made such a will in compliance with the agreement and they were married. Joseph subsequently made another will revoking the one in favor of Aurelie.

The court not only held that neither the marriage nor the execution of the will constituted sufficient part performance of the contract, but that under no consideration did the execution of the will constitute full performance by the husband.

Because the court disposes of all of the arguments advanced by appellants in this case we wish to quote from the opinion in extenso at pages 876-8:

Busque v. Marcou, 86 Atl. (2) 873, 876-8:

> "In the case of a verbal contract made in consideration of marriage, however, the marriage alone, even though it is an irretrievable change of position, is not a part performance upon which equitable relief can be based. This rule which is firmly established, is based upon the express language of the statute. The marriage adds nothing to the very circumstance described by the statutory provision which makes the writing essential. Unlike the other paragraphs of Section 1 of the statute of frauds, in paragraph III it is the consideration of the contract which brings it within the statute, not the nature of the promise made. To say that in the case of an oral contract made in consideration of marriage the bar of the statute

is removed, even in equity, by the marriage itself would destroy the statute and make it meaningless."

"A very full annotation on this subject is found in 48 A. L. R. 1356 and contains decisions from twenty States and from the English courts sustaining this view. In accord with the overwhelming weight of authority, which is sustained by sound reasoning and irrefutable logic, we hold that marriage alone pursuant to an oral contract in consideration thereof is insufficient either at law or in equity to remove the bar to the enforcement of such contract which is imposed by Section 1, paragraph III of the statute of frauds. Nor did the execution of the first will by Joseph constitute such a partial performance of the contract as would in equity remove the bar of the statute of frauds. Part performance to operate as a bar to the application of the statute of frauds must be part performance on the part of one seeking to charge the other party under the contract, not part performance on the part of the one whom it is sought to charge. As said in the English case of *Caton v. Caton,* 1865, L. R. 1 Sh. Eng. 137, affirmed in 1867, L. R. 2 H. L. 127, 6 Eng. Rul. Cas. 256: 'The preparing and executing of the will cause no alteration in the position of the lady, and I presume it will not be argued that any consequence can be attached to acts of part, performance by the party sought to be charged.'

"The plaintiff claims, however, that this case is that of a wholly executed contract. She says that subsequent to entering into the oral contract, the decedent fully performed his part of the contract by executing a will in accord with the terms thereof and that she performed her part of the contract by entering into the marriage. She further claims that the statute of frauds has no application to contracts which have been fully executed by both parties."

"Although it is true that an oral executory contract which fails to comply with the requirements of the statute of frauds is unenforcible, it is equally true that when the contract has been fully executed it cannot be abrogated for that reason. The position of the plaintiff that the making of the first will by Joseph pursuant to his oral contract so to do, which contract was entered into in consideration of marriage, constituted full performance on his part is not tenable. Mere execution of a will is not full performance on the part of the promissory in such a contract. A will is ambulatory in its nature and may be revoked at any time prior to death. Full performance of the contract on the part of the promissor requires not only the making of the will but also that the will be allowed to remain in force until his death. Whether this condition be the subject of an express promise contained in the oral contract or be implied from the oral promise to make a will in favor of the promisee is immaterial and can make no difference in the result. In either event the promise, be it express or implied, forms a part of the contract and it is made in consideration of marriage, and it cannot be enforced unless the contract or some memorandum thereof is in writing and signed by the promissor. The cases of *Brought v. Howard,* supra; *Zellner v. Wassman,* 184 Cal. 80, 193 Pac. 84; *Hughes v. Hughes,* 49 Cal. App. 206, 193 Pac. 144; *Luders v. Security Trust & Savings Bank,* 121 Cal. App. 408, 9 Pac. (2) 271, and *Caton v. Caton,* supra, are all cases in which it was held that the fact that a will was executed in accordance with an oral contract made in consideration of marriage did not prevent subsequent revocation thereof by the testator. This same principle was also recognized in *O'Brien v. O'Brien,* 197 Cal. 577, 241 Pac. 861. As said in *Caton v. Caton,* supra: 'As a will is necessarily, until the last moment of life, revocable, a contract to make any specified bequest, even when a will having that effect has been duly prepared and executed, is in truth a

contract of a negative nature—a contract not to vary what has been so prepared and executed. I do not see how there can be part performance of such a contract.'

"In *Zellner v. Wassman,* 184 Cal. 80, 193 Pac. 84, 87, the Supreme Court of California said: 'Nor does this case fall within the rule that the statute of frauds cannot be invoked in case of a completed oral contract (*Schultze* (*Schultz*) *v. Noble,* 77 Cal. 79, 19 Pac. 182; *Colon v. Tosetti,* 14 Cal. App. 693, 113 Pac. 365, 366), for the contract now sued upon was not completed. The reason that the contract is now in court is because the decedent did not perform his part of the alleged agreement by causing to be in existence at the time of his death a will bequeathing $5,000 to plaintiff. The mere execution of a will was not a performance of the contract.' "

F. No Fraud Sufficient to Avoid Statute.

Counsel for appellants urge that the statute of frauds cannot be used to perpetuate a fraud and to deny recovery in this case would be using the statute of frauds for the purpose of defrauding the appellants.

The court found that the promise made by John Henry Kucks to Catharina Schlaadt was made in good faith and without any intent to defraud or deceive Mrs. Schlaadt. (Par. IV Findings, R. 16.)

"On the matter of fraud, I think I need say very little on that, as I have indicated it is my conclusion, and I can see no other conclusion that could be reached under the testimony, that Henry Kucks when he made the promise made it in good faith, that there was no fraud, no deceit, and the fact that he did fail to carry out the agreement it seems to me is not sufficient evidence of fraud without something more, so I can't say that the statute of

frauds in this case can be avoided on account of any fraud practiced upon Mrs. Schlaadt by Henry Kucks." (R. 151-2.)

The authorities uniformly hold that the mere failure to carry out the promise which was the inducement for the marriage does not constitute such fraud as will authorize relief in equity in the absence of artifice or trickery.

49 *Am. Jur.* par. 580, at page 886:

"Sec. 580. *What Constitutes Fraud.* While it has often been truly said that the courts, and particularly the courts of equity, ought not to allow the statute of frauds to be used as an instrument of fraud or wrong, or permit the statute to be interposed as a defense where the effect would be to accomplish a fraud, and courts of equity, to prevent the statute from becoming an instrument of fraud, have in many instances relaxed its provisions, it is clear that the mere breach or violation of an oral agreement which is within the statute of frauds, by one of the parties thereto, or his mere denial of an agreement or refusal to perform it, is not of itself a fraud either in equity or at law from which the courts will give relief or which will enable the other party to assert rights and defenses based on the contract. If it were, the statute of frauds would be rendered vain and negatory."

23 *Amer. Juris.* par. 38, page 799:

"It is a general rule that fraud cannot be predicated upon statements which are promissory in their nature when made and which relate to future actions or conduct, upon the mere failure to perform a promise—nonperformance of a contractual obligation—or upon failure to fulfil an agreement to do something at a future time or to make good subsequent conditions which have been assured.

Such nonperformance alone has frequently been held not even to constitute evidence of fraud."

37 *C. J. S.* par. 217, at 714:

"A mere failure or refusal to perform an oral contract, within the statute, is not such fraud, within the meaning of this rule, as will take the case out of the operation of the statute, and this is ordinarily true even though the other party has changed his position to his injury."

The authorities furthermore hold that mere nonperformance of a promise is not in itself evidence establishing fraud or lack of intent to perform.

37 *C. J. S.* par. 116, at page 441:

Rankin v. Burnham, 150 Wash. 615, 617, 274 Pac. 98:

"Respondents may in good faith have asserted their intention to so aid their lessee. Their change of mind, their falure to keep the offer open, does not amount to a fraud. True, the failure of performance of a promise may be without excuse or justification in morals, yet not cognizable as a fraud in law. This statement of intention merely cannot be construed as a fraudulent representation. At most it is only an assertion of a present mental condition."

Carkonen v. Alberts, 196 Wash. 575, 614, 83 Pac. (2) 899, 916:

"A constructive trust, or a trust ex maleficio, can not be established merely upon a broken promise to purchase, or to negotiate purchase of, as agent, lands for another, there being no positive fraud perpetrated other than the breach of the promise."

Fischer v. Fischer, 184 N. W. 116, at page 118:

"In none of the above cases was it held that the parol contract was taken out of the statute of frauds, except where it was shown that the complaining party was induced to enter into the marriage contract by some artifice and deception; and no case has been brought to our attention holding that the mere failure to keep the promise made in the agreement amounts to artifice or fraud. The case before us presents no facts or circumstance of the character just mentioned which would justify a court of equity in disregarding the statute."

Hughes v. Hughes, Cal. 193 Pac. 144, at page 148:

"From our examination of the foregoing, and many other authorities, we are convinced that the distinguishing feature of the case at bar did not amount to such actual fraud as to entitle the plaintiff to any equitable relief. The facts present nothing more than the mere omission to put the contract into writing before the marriage, and a failure to perform it thereafter. It does not appear that the defendant in any manner prevented the due execution of a valid marriage settlement in writing such as would have satisfied the statute. It is not alleged, or contended, that the plaintiff was induced through deceit, false statement, or concealment of the defendant to waive a written agreement and rely upon the promises in parol, before entering into the marriage relation. 2 Pomeroy's Equity Jurisprudence, Fourth Edition, par. 921. For aught that appears in the amended complaint, the defendant may have entered into his engagements in the highest good faith and with every good intention, and with full ability to perform. Granting, for the purpose of the discussion, that the plaintiff may have been led into the marriage by the Lochinvar courtship of the aged swain, the inducement went only to that relation. By no

fraud, trick, or device, so far as the record discloses, was she prevented from securing what the law sanctions, a written marriage settlement. Equity, therefore, can afford her no relief."

Alexander v. Alexander (N. J.), 124 Atl. 523, at page 524:

"Certain English cases are to be found in which parol agreements in consideration of marriage have been enforced under what is known as the 'doctrine of representations'; in Reed on the Statute of Frauds it is stated that cases of that nature do not apparently extend to representations made by the husband or wife to the other, but are confined to representations made by others, such as parents or guardians. 1 Reed on Statute of Frauds, par. 177, at page 289."

Davidson v. Edwards (Ark.), 270 S. W. 94 at page 95:

"It is well settled in this state that a mere refusal to perform a parol agreement, void under the statute of frauds, is not of itself fraud. The reason is that the jurisdiction of courts of equity in such cases is founded upon the fraud and not upon the agreement. It has been well said that the statute of frauds would be forse than waste paper if a breach of promise created a trust in the promisor, which the contract itself was insufficient to raise."

This court has held even though John Henry Kucks had no intention of keeping his promise, it is not such fraud that a court of equity will consider sufficient to grant specific performance.

Levi v. Murrell (9th circuit), 63 Fed. (2) 670, at page 672:

"The appellant seeks to bring the case within the rule sometimes applied in courts of equity, that where there is fraud in connection with the execution of an oral agreement the courts will en-

force the agreement, notwithstanding it is not in writing. The allegation of fraud relied upon in the case at bar is that the decedent made the oral agreement to execute the will without any intention of performing the agreement. Assuming without deciding, that this is a sufficient allegation of fraud, it is not the type of fraud acted upon by courts of equity in connection with specific performance. Such fraud usually relates to some subterfuge by which the promisee is induced to believe the contract has been reduced to writing or is being reduced to writing when in fact it is not. *Zellner v. Wassman,* 184 Cal. 80, 193 P. 84; *Hughes v. Hughes,* 49 Cal. App. 206, 193 Pac. 144."

APPELLANTS' AUTHORITY

The only case cited by appellants on this point is *Mobley v. Hawkins,* 14 Wash. (2) 276, 128 Pac. (2) 289, which is not in point and merely reaffirms the well established rule that where a purchaser or tenant takes possession under an oral contract to purchase or lease real estate and makes substantial improvements, the same constitutes part performance.

CONCLUSION

The judgment of the trial court should be affirmed for the following reasons:

I. The terms of the alleged oral contract were not established by evidence that was conclusive, definite and certain;

II. The oral agreement was void under the Statute of Frauds of the State of Washington;

III. The marriage of Catharina Schlaadt to John Henry Kucks did not constitute sufficient performance of the contract to remove the ban of the statute of frauds. According to the contract, the only obligation upon the part of Catharina Schlaadt was to marry John Henry Kucks and the only things she did were incidental to the consummation of the marriage.

IV. The execution of the wills according to the overwhelming weight of authority did not constitute partial or complete performance because of their ambulatory character and were revoked by the said John Henry Kucks prior to his decease.

V. The alleged fraud consisted merely in the failure of John Henry Kucks to carry out his promise and the unquestioned weight of authority is that such a breach does not constitute fraud of the character sufficient to grant relief in equity.

Respectfully submitted,

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No. 13554

IN THE

United States

Court of Appeals

For the Ninth Circuit

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Appellants,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife; FRED JAHNKE and EMMA JAHNKE, Husband and Wife; and EMIL ZIMMERMAN as the Executor of the Last Will and Testament of JOHN HENRY KUCKS, Deceased.

Appellees.

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

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STATUTES AND TEXTS

PREFATORY REMARK

In this brief we shall reply point by point to the points of appellees, using substantially appellees' headings.

I

APPELLEES' "ADDITIONAL STATEMENT"

In view of the high degree of credit given to the findings of fact of the trial courts as to credibility of witnesses, we are startled to see appellees open their brief with an attack, first, on the truthfulness of the testimony adduced by appellants and, second, on the weight of that testimony, when the trial court has so clearly found against them on both these points. We shall note later another confession of weakness by appellees in their futile attempt to evade the Washington decisions, that so fully apply to the findings in favor of appellants, by resorting to the decisions of other states in the hope that this court will prefer such decisions as those of Maine and Illinois to those of the Supreme Court of Washington.

Thus appellees open their brief by an "Additional statement" in which they

> "urge that the testimony was insufficient to support the finding that the alleged oral agreement was entered into by Catharina Schlaadt and John Henry Kucks."

This attack on the findings of the court, if the trifling criticism of the testimony made by appellees rises to the dignity of an attack, consists of three points:

1. The statement that all of the witnesses for appellants by reason of their relationship to Grover Schlaadt were "interested" in the outcome. Appellees do not point out any improbability, any weakness in their testimony. They are content to make the suggestion of interest and let the matter drop. But the trial court was manifestly persuaded by the candor, the frankness, the bearing and the demeanor of these witnesses that they were telling the truth and he so found. Would any appellate court, merely on the suggestion of interest, be warranted in concluding that each and all of these witnesses were lying and that the trial court ought not to have believed them, especially when their testimony is so well supported by written documents, the wills in Exhibits 4 (R. 37) and 5 (R. 39), and by the inherent probabilities of the case?

2. The second criticism is rather legal than factual. Appellees are at pains to point out that the witnesses with one exception did not say how Kucks "was going to divide the land" and they quote Arletha Schlaadt as testifying that Kucks "later said he was going to leave the Davenport farm to Grover and the Canada land to Garfield (R. 93)". Reference to the record will show that this is not a statement of Arletha's testimony. On cross examination

she testified that Kucks told her

> "I would like to have Grover [have the Davenport land], because Grover is a good farmer." (R. 93. See also R. 82, 84, 88, 91.)

These words "I would like" are significant. Read in connection with the will of February 11, 1946, executed at the time of this conversation, they indicate that Kucks undertook only to devise and bequeath his estate to the two sons of his deceased wife, leaving it to them to divide, but with this oral expression of preference that Grover arrange to take the Davenport land. It is so much the custom of a father to leave his estate in undivided shares to his children or to any other like group of beneficiaries of equal rank that this was a perfectly natural provision of the will. Kucks regarded Grover and Garfield as sons and introduced Grover's son as "my grandson" (R. 135)).

True, at the bottom of this same page (R. 93) the cross examiner put words in Arletha's mouth that indicated that Kucks was leaving by his will the Davenport and Canadian lands to Grover and Garfield respectively. Arletha, not alert enough to observe this distortion of her earlier testimony, assented. But this does not change her own account of the conversation, which is borne out by the will he had just executed.

3. Appellees' third point in their "additional statement" is an attack upon finding of fact number

5 (R. 16), which is:

> "Further this testimony on behalf of plaintiffs finds corroboration in the subsequent conduct of John Henry Kucks in the making of the wills recited in paragraphs 9 and 11 herein."

To this appellees suggest that

> "The first will made out by the decedent left all of his property to Catharina Schlaadt and none of the subsequent wills left *all* of his property to the appellants." (Emphasis ours.)

The court will observe that the first will executed during marriage left the property to his "beloved wife" (Ex. 4, R. 37). Kucks was 82 at this time, five years older than Catharina, and would naturally conclude that in all probability his wife would outlive him, hence it is a fair inference that he left her the whole of his estate for her to pass on to her sons.

As to the second will the court will observe that it (Ex. 5, R. 39) left the whole of the estate to the two sons save only $500 for an infant foster child named Gary Handel. This, however, was left in trust to Grover Schlaadt and if Gary did not reach the age of 21 the proceeds were to go to Grover and Garfield Schlaadt. Also, Grover was appointed the executor of the will, which was nonintervention. In an estate of over $90,000 to make so minor and conditional a bequest as $500 is assuredly not even a flaw upon the full performance of the promise made to Catharina Schlaadt.

Such niggling criticisms of these two wills, like the aspersion cast upon the probity of appellants' witnesses, indicate the lengths to which appellees feel obliged to go in their endeavor to find fault with the findings of fact of the trial judge.

As Judge Driver said,

> " . . . it isn't at all unusual that he [Kucks] should, in carrying out a promise of this kind, first make his will to his wife, and then make it out to the two boys in the way he did" R. 142.

II.

ARGUMENT

A. *Was Oral Agreement Established by Clear and Convincing Evidence?"*

On this so slight a base of criticism of the court's findings of fact appellees baldly assert that in spite of the presumptions in favor of the trial court's findings of fact they

> "do not believe that the alleged prenuptial oral agreement was established by that degree of evidence required by the Supreme Court of Washington to establish such contracts."

This is followed by printing in italic type the rule of the Supreme Court of Washington that an oral promise to make a will or to devise or bequeath property must be established by evidence

> *"that is conclusive, definite, certain and beyond all reasonable controversy."*

No reason is advanced, no fact or circumstance is adduced on which this belief could be based and counsel blandly pass over the fact that the trial court in its finding of fact 5 (R. 16) held that the evidence adduced by appellants "is conclusive, definite, certain and beyond legitimate controvery." Not only was the evidence found in favor of appellants in precisely the terms so emphasized by appellees, but the court went on to say, as we have quoted before:

> "Further, this testimony on behalf of the plaintiffs finds corroboration in the subsequent conduct of John Henry Kucks in the making of the wills recited in paragraphs 9 and 11 herein." (R. 16.)

On the next page of appellees' brief, again without calling the court's attention to any point upon which appellants' proof was insufficient, appellees point out that in order to establish an oral contract it is necessary to show by such conclusive evidence:

> "1. That the contract was entered into;
>
> 2. That services were actually performed;
>
> 3. That services were performed in reliance on the contract."

Here, too, the court's findings cover all three of these terms. Finding 5 (R. 16) satisfies point one "That the contract was entered into"; findings 7, 8 and 9 (R. 17) cover the point "That services were actually performed"; finding 6 (R. 17), in its recital that the promise "was the special inducement" and that Catharina "would not have married [Kucks]

but for such promise", shows "That services were performed in reliance on the contract."

We feel that we are battling cobwebs in meeting "points" so destitute of any foundation in fact, but appellees place so much reliance upon them that we have no alternative. In this behalf it is perhaps well for us to recite as briefly as we can the significance given to findings by our federal appellate courts:

Rule 52(a) of Federal Rules of Civil Procedure, 28 U. S. C. A. 13:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In *Lewis Mach. Co. v. Aztec Lines* (7 Cir.), 172 F. 2d 746, 748, the effect given to findings of fact is stated thus:

> "Since this case was tried by the court without the intervention of a jury, the findings of fact made by the trial court may not be set aside by us unless clearly erroneous. Federal Rules of Civil Procedure, rule 52(a), 28 U. S. C. A. If there is any substantial evidence to support these findings, the liability of Aztec is established here. In considering this record, we look only to the evidence most favorable to the District Court's findings and such reasonable inferences as may be drawn from such evidence."

In *Skelly Oil Co. v. Halloway* (8 Cir.), 171 F. 2d 670, 674, the rule is stated:

> ". . . The power of a trial court in a non-jury case to decide doubtful issues of fact is not lim-

> ited to deciding them correctly. On review, the question is not what finding of fact the trial court might have reached on the evidence before it, but whether there was substantial evidence upon which the finding which the court made could properly be based. We may not set aside the finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law."

This circuit, in *Lassiter v. Guy F. Atkinson Co.*, (1949), 176 F. 2d 984, has stated the rule in substantially the same terms.

These and many more cases to the same effect are collected in *Barron & Holtzoff, Federal Practice & Procedure* (Rules Edition, 1950), vol. 2, pp. 834-848.

Even with a much less favorable rule than this, in view of the fact that appellees have not been able to point to any evidence looking to a contrary view, it is clear that the findings of fact of the trial court are invulnerable to attack.

B. *"Contract Void Under Statute of Frauds."*

We are at a loss to understand why appellees place such emphasis on the language of the statute of frauds, especially when they conclude their arguments and quotations with the remark that the question to be resolved is whether the marriage and the making of the wills "constitutes sufficient performance to take the contract out of the statute of frauds." While there is more to it than merely the

marriage and the making of the wills, we are in complete agreement that the question is whether there was sufficient performance to take the contract out of the statute. The findings of the court, to our minds, clearly establish not only part, but complete, performance on both sides of the oral contract which takes the contract out of the statute. We have not at any time contended otherwise.

This heading is illustrative of the tactics of appellees throughout their brief. Under this and the next two headings of their brief appellees content themselves with enunciating, first, that this oral contract is void under the statutes, ignoring the full performance on both sides; second, that marriage is not sufficient performance, just as if marriage alone were relied on; and, third, "a will is not sufficient performance," just as if we had nothing but an oral promise and a will. Not once do appellees look at the case of appellants as a whole, with all of its factors of performance, both partial and complete. They are content to split the evidence into segments and weigh each bit by itself as though that bit were the whole of the case.

To the contrary, as we pointed out in our opening brief, the Washington Supreme Court properly considers each case as a whole, takes into account all of the relevant facts, as this Court will do. Only in this manner can a just appraisal of the case of appellants be made.

This "divide and conquer" policy as a means of destroying an unwary enemy may have its place in war. It is manifestly out of place in an impartial consideration of legal problems.

C. *"Marriage Not Sufficient Performance to Remove Bar of the Statute."*

Under this heading, which is really the theme song of appellees' brief, counsel for appellees ignore or wave to one side all facets of Kucks' proposition to Catharina except that one which presented the necessity that she marry him. The other sides of the proposition, just as important and vital as the marriage ceremony, are ignored—for understandable reason.

Let us look at the reason for the prohibition of the statute. Courtship and marriage are normally the incidents of the young, before either of the parties has "settled down." In the mating season of life all manner of extravagant statements are apt to be made by either party. To hold either of the parties to incidental oral statements or promises, when passion rather than reason is ascendent, is rightfully contrary to the policy of the law embodied in the statute of frauds.

But we are not dealing with such a case nor with one remotely resembling it. At pages 7 and 8 of their opening brief appellants called the attention of appellees to the fact that the Supreme Court of Washington has many times recognized "Each case of the

kind now before us must rest upon its *own peculiar facts* and circumstances." (Italics ours.) To this statement of our court appellees make no answer whatsoever. They throw out of the case all the surrounding circumstances. They seek to reduce the case to the single formula "where marriage is involved no oral promise is binding."

Let us, then, look at the "peculiar facts and circumstances" that call for a broader analysis and understanding than appellees are willing to apply.

The findings of fact, augmented by the undisputed testimony, disclose that Kucks, a German-American of 81 living in Davenport, Washington, having recently lost his wife, wanted a second wife to look after him in his sunset years at his home in Davenport, Washington. Without courtship, preliminary or otherwise, he appealed to the mother-love of Catharina by a promise to leave all that he had to her sons, pointing out that he had no children or near relatives of his own.

Kucks did not regard his unheralded and point-blank offer as a sentimental proposal of marriage but as "a *proposition* to make to your mother . . . I told her if she would [marry me], I would leave all my property . . . etc." (R. 72.) (Emphasis ours.)

Catharina both recognized and treated this as the material proposition that it was. She saw that the nub of the proposition was not marriage alone but a performance quite apart and beyond that. Kucks

was asking her to uproot her Portland home, move into his Davenport home and thenceforward perform its household duties for him.

She was unwilling to undertake performance of that requirement of the proposition until she knew what sacrifice it would entail. She and Kucks both recognized that this requirement was the motive for the offer and that her acceptance of the offer depended upon her willingness to render that performance. She said to Arletha, wife of Grover Schlaadt, in the presence of Kucks, "I told Henry he'd have to give me a little time to think it over; you know, I have a pretty nice home here, Henry." Henry replied, "Kate, I know you have; I have a nice home in Davenport, too." (R. 72.) Catharina said, "I'll tell you what I'll do, Henry; I'll go up to Davenport and look your place over, then I'll give you my answer." (R. 72.)

Having lived in her own comfortable home for a quarter of a century, having three generations of her own flesh and blood near her and devoted to her, having many friends resulting from half a century of living in Portland, she was now asked by Kucks to make a very great sacrifice, to give up all this and go to a strange town at her advanced years. (R. 74, 77.)

So she made this trip to Davenport alone, remaining away ten days. (R. 79.) Only then did she decide that the provision she could make as a mother

for her two sons was worth the sacrifice demanded of her (R. 81)). The testimony of appellants' witnesses, credited and believed by the trial court (R. 141, 145), is that in explaining her decision to her son and daughter-in-law she said, "You know, I am thinking about my kids." (R. 116.) And on other occasions to Arletha, to Neva and Grover Schlaadt, Jr., she said that she could trust Henry Kucks to keep his promise to her, that "he will stick by my boys" (R. 82, 116, 131, 132, 134).

On her return the following took place (testimony of Arletha Schlaadt, wife of Grover Schlaadt, Jr.):

> "A. She took Henry's measurements of his floor, and said, 'I want to get a rug, because he has linoleum on his floor.' She said, 'His house is dirty, but I can clean it up, and with my furniture I can make it look nice,' so then I went uptown with her a little later and we picked out a rug." (R. 82; cf. 103.)

After the wedding in August 1944 Kucks and Catharina spent a week in Catharina's home packing up Catharina's furniture, furnishings, personal belongings and dishes with which Catharina proposed to furnish the Kucks home. In major part, so far as the witness could recall, this consisted, in addition to the new rug for the living room, of another rug for the bedroom, dining room table and six chairs, rockers, davenport and chair, blankets and a quilt and dishes (R. 87, 103). These contributions had to be made to make the Kuck's home more livable and more like the better living conditions to which she was accustomed.

To the trial court, thinking, perhaps, of the usual marriage at youth or middle age, this action may seem only the ordinary incident of marriage. But to Catharina it was of vital importance. Her final acceptance of this, to her, hard condition must be given great weight, as an act of performance on her part, by any person imaginative enough and sensitive enough to see with *her* eyes the sacrifice it imposed on her.

At page 23 of their brief appellees refer to the statement made by our Supreme Court in *Alexander vs. Lewes* (1918), 104 Wash. 32, 175 Pac. 572, that "it is not the quantity but the character of the consideration that controls." JUST SO! A young woman, eager to have a husband and home of her own, might attach very little importance to the removal from one place to another. But it was of great importance to Catharina and, when she finally bound herself to sacrifice her own home and all it meant and to go to Davenport and to make Kucks' home livable for them both, she had done what was primarily and basically required of her to perform this contract. Who can say that her conduct, quite apart from the act of marriage, was not an act of performance of the, to her, heavy burden that she necessarily took upon herself?

To ignore this aspect of the case altogether, as appellees do, to treat it as the trial court did in his second oral opinion when he says, "Everything that

she did was purely *incidental* to the marriage, it is something that a wife would be *expected* and be *required* to do," is, it seems to us, to be flatly contradictory of all normal considerations in marriage. We do not here refer alone to the material contributions of Catharina, though they are substantial, but still more to the spiritual ties, the fruit of a long and useful life, that had to be ruptured.

Contrary to the conclusion of the trial court, the usual, the incidental feature of marriage is that the bride is lifted out of her dependence on her parents in their home, where she is a secondary figure, to the position of mistress in her own home, newly furnished for her by her husband. Here, we have exactly the opposite situation. The elderly bride already had an independent position and a home of her own, which she is obliged to surrender. Instead of having a husband to furnish her with a new home, she must herself add largely to its furnishings to raise it toward that standard of style and comfort which she has earlier achieved.

It is because Catharina's situation and sacrifices are the reverse of what is "incidental," what is "expected," what the average wife is "required to do," that we stress the importance of these actions and sacrifices of Catharina as a necessary and dominant part performance of the oral contract, far more significant and important than the minor feature seized upon by the Washington Supreme Court in

the case of *In re Fischer's Estate* (1938), 176 Wash. 41, 81 P. 2d 189.

In that case, the court will recall, the bride brought $700 to the marriage and the husband $1,500. As an incident to their marriage they agreed that this should be treated as community property instead of the separate property of each. They further orally agreed at that time that each would make a reciprocal will, leaving his or her estate to the other, and so they did. The wife made no sacrifice of any kind. She gained more than she gave by this oral agreement to merge assets. But, 12 years later, the wife made a second will in favor of her sister, covering her half of the community estate. In the probate of the wife's estate the Supreme Court recognized this incidental oral agreement respecting conversion of separate estates into community property, *plus* the wife's initial execution of her will in favor of her husband, *although later revoked,* as *full* performance by the wife of their oral agreement to make wills in favor of each other.

Manifestly, the Fischer case is on all fours with the case of appellants. How do appellees treat it? Largely, their brief (p. 32-33) ignores it, merely remarking that "the husband relinquished his separate property to his wife, and also made his will. The court *properly* held that there was sufficient performance of the oral contract." (Emphasis ours.)

We thank counsel for this frank admission that the Fischer case represents the law of this state. But we must point out that, in their eagerness to distinguish this case from ours, no doubt by inadvertence, they misstate its facts. The husband did *not* "relinquish his separate property to his wife." The allegation of the pleadings is that husband and wife agreed "to pool their separate properties and held them as community property." And, as we have seen, it was the *wife's* contribution to that fund of only $700, plus the making of her first will, that our Supreme Court said constituted *full* performance on her part, and obliged the decree to go against her estate. Can this court say, as did the trial court, that the sacrifices and contributions of Catharina are "nothing," while this trifling concession of the wife in the Fischer case is adequate to take that case out of the statute of frauds?

Even the trial judge, at the conclusion of the testimony, before he had reached his conclusion on the law of the case, was aware of the unique features of this marriage and of some of the sacrifices Catharina had to make. He said:

> "A thing that appeals to me is that here is a widow woman about, as I recall, 76 years of age. She's been widowed for a good many years. It isn't one of these rebound situations where even an elderly person in the first shock of loneliness and loss takes a companion by marriage by way of relief. . . . She had settled down in a comfortable home in Portland, and had her children and grandchildren near at hand, so it isn't likely

> that she would marry an 81 year old man unless there was some inducement other than the romantic considerations that usually lead to marriage. To quote from Hamlet, I think it's apt here, when he was upbraiding his mother for marrying his uncle so soon after his father's death, he said to her, 'You cannot call it love, for at your age the heyday of the blood is tamed, it's humble and waits upon the judgment'; so I think that's the situation here, and just as a matter of common sense and ordinary human experience, it's likely and reasonable that there was some special inducement that led this 75 year old woman in her circumstances to marry Mr. Kucks, so that to that extent I think it corroborates the testimony of these witnesses, which I said I have credited." (R. 142.)

The texts and cases from other states cited under this heading concern themselves only with oral promises followed by marriage and with no act either of part or of full performance. With such cases and texts we have no concern.

Of this character is *Koontz v. Koontz* (1915), 83 Wash. 180, 145 Pac. 201, the only Washington case cited under this heading except the cases taken from our opening brief, which appellees seek to distinguish. In the Koontz case, not the slightest act of performance is alleged or claimed, nor was any will drawn pursuant to the alleged oral agreement. It is altogether too remote to require comment.

Nor will we be drawn away from our consideration of the Washington cases, controlling here, into the easy task of distinguishing cases from other states.

All that is required for the determination of this case is found in the numerous cases adduced in our opening brief.

D. *"Execution of Will Not Sufficient Part Performance."*

Here, again, appellees are belaboring an effigy of their own creation. In our opening brief (p. 18) we pointed out, as clearly as we know how, that "our Supreme Court has several times held that the *mere* making of a will, with no other act of performance by either promisor or promisee, is not sufficient part performance" and we there considered most of the cases that appellees now cite. But we also pointed out that this was true only when the making of the will was unaccompanied by any other act of performance. Appellees ignore this vital distinction and hammer away at the broad rule as if it had somehow been drawn in question.

E. *"Marriage and Execution of Will Insufficient Performance."*

The most significant aspect of appellees' discussion under this head is that they do not cite a single case from the Supreme Court of Washington. They seek to overcome the telling weight of the Washington decisions, which have marked out a path of their own, by citing cases from other jurisdictions. Thus, they overlook the fact that this Court will decide this case as the Washington Supreme Court would decide it.

If we had no Washington decisions to bear upon the question, it would be appropriate to turn to the decisions of other states. But there is such a wealth of judicial decisions of Washington from which to drawn our conclusions that appellees' course is just the opposite of the course taken by the Washington Supreme Court itself.

Beginning with the decision of the case of *Eidinger v. Mamlock,* 138 Wash. 276, 244 Pac. 684, decided in 1926, followed by 27 other cases, discussing the validity of oral contracts under the statute of frauds, the Washington Supreme Court has not once supported its decision by citing a single case from other jurisdictions. These cases, in which our Supreme Court has relied solely on its own earlier decisions on this subject are:

Henry v. Henry, 138 Wash. 284, 244 Pac. 686;

Sweetser v. Palmer, 147 Wash. 686, 267 Pac. 432;

McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70;

Avenetti v. Brown, 158 Wash. 517, 291 Pac. 469;

Whittaker v. Titus, 166 Wash. 225, 6 Pac. 2d, 649;

Lohse v. Spokane & Eastern Trust Co., 170 Wash. 46, 15 Pac. 2d 271;

Clark v. Crist, 178 Wash. 187, 34 Pac. 2d 360;

Lager v. Berggren, 187 Wash. 462, 60 Pac. 2d 99;

Resor v. Schaefer, 193 Wash. 91, 74 Pac. 2d 917;

Wayman v. Miller, 195 Wash. 457, 81 Pac. 2d 501;

In re Fischer's Estate, 196 Wash. 41, 81 Pac. 2d 836;

Osterhaut v. Peterson, 198 Wash. 166, 87 Pac. 2d 987;

In re Swartwood & Welsher Estates, 198 Wash. 557, 89 Pac. 2d 203;

Thompson v. Weimer, 1 Wash. 2d 145, 95 Pac. 2d, 772;

Luther v. Nat'l Bank of Commerce, 2 Wash. 2d 470, 98 Pac. 2d 667;

Aho v. Ahola, 4 Wash. 2d 598, 104 Pac. 2d 487;

Allen v. Dillard, 15 Wash. 2d 35, 129 Pac. 2d 813;

Dau v. Pence, 16 Wash. 2d 368, 133 Pac. 2d 523;

Widman v. Maurer, 19 Wash. 2d 28, 141 Pac. 2d 135;

Payn v. Hoge, 21 Wash. 2d 32, 149 Pac. 2d 939;

Whiting v. Armstrong, 23 Wash. 2d 290, 160 Pac. 2d 1014;

Blodgett v. Lower, 24 Wash. 2d 931, 167 Pac. 2d 997;

Jennings v. D'Hooghe, 25 Wash. 2d 702, 172 Pac. 2d 189;

McLean v. Archer, 32 Wash. 2d, 201 Pac. 2d 184;

Southwick v. Southwick, 34 Wash. 2d 464, 208 Pac. 2d 1187;

Groenever v. Dean, 40 Wash. 2d 109, 241 Pac. 2d 443;

In re Boundy's Estate, 40 Wash. 2d 203, 242 Pac. 2d 165.

In only two of these 28 cases does the Washington Supreme Court even notice the existence of cases from other states concerning these oral contracts under the statute of frauds. In *McCullough v. McCullough* (1929), 153 Wash. 625, 280 Pac. 70, our Court distinguishes a single California case called to its attention by the defeated party and in *Luther v. National Bank of Commerce,* (1940) 2 Wash. 2d 470, 98 Pac. 2d 667, it likewise distinguishes or declines to follow a group of four cases from other states pressed on its attention by the defeated party. The fact that it has this task of distinguishing or declining to follow cases from other states in only these two cases indicates clearly that members of the Washington bar quite generally recognize that it is useless to go outside the decisions of our own state in connection with such questions. This is made the plainer in that when other questions of law arise in these cases the Washington Supreme Court draws freely on the judicial learning of other supreme courts.

In our opening brief at pages 9 et seq. we demonstrated by appropriate citations and quotations from

Washington decisions that Washington opinions were exacting as to quantum of proof of an oral contract otherwise void under statute of frauds, but once sufficient proof was offered they were *liberal* as to what constitutes part performance sufficient to take that oral contract out of the statute. Appellees formally ignore that demonstration but indirectly seek to answer it by the use of these citations and quotations from other states that are more strict than the Washington court as to what acts constitute part performance.

Further, in ignoring the Washington cases set forth in our opening brief which deal with contracts fully performed and therefore not within the statute of frauds and in seeking to rely solely on the decisions of other states, appellees do but reveal the weakness of their case in its most vital point.

Under this heading appellees once more run true to form. In each of their cited cases the only facts shown were the making of the promise followed by the marriage and the making of a will. No equities on behalf of the plaintiff were alleged or proved, no facts even remotely like the sacrifices and performance of Catharina appear in any of these cases.

By way of illustration, and without proposing to go farther, we analyze briefly the first case cited by appellees, which they regard as "*exactly* in point," *Hughes v. Hughes* (Calif. Dist. Ct. App., 1920), 193 Pac. 144. This is a rather smelly case of an infatu-

ated man making wild promises to convey real and personal property to the woman he was eager to marry. A few days after the marriage he made a will in her favor but he failed to build the $100,000 apartment house for plaintiff, or to pay off the $60,000 mortgage on plaintiff's property, or to give her the expensive jewelry, the ermine coat and the automobile he is alleged to have promised her.

In the first year of their marriage plaintiff brought suit to compel her husband to make these gifts, to convey the property and for a receiver. She did not allege that the will had been revoked. She was just refusing to be fobbed off with a will when what she wanted was the cash, the jewels and the furs. Of course, the will could not be used to prove these promises to make present gifts and conveyances. And this typical golddigger case is said by appellees to be "exactly in point"!

We do not propose to be led into further analyses of cases that would not have weight with the Supreme Court of Washington. We content ourselves with remarking that much of the language quoted is certainly out of tune with the decisions of our Supreme Court.

III

CONCLUSION

The weakness of the position of appellees is demonstrated by their persistent efforts to draw attention from the main question at issue in the following respects:

1. The opening of their brief with an attack upon the credibility of the witnesses of appellants in spite of the finding as to their truthfulness expressed by the trial court.

2. Their denial that the testimony of appellants is "conclusive, definite and beyond legitimate controversy," this also in the teeth of the trial court's finding.

3. Their contention that the first and second wills of Kucks do not corroborate the oral testimony of appellants, again in flat contradiction of the finding of the trial court.

4. Their unwarranted attempt to inject into Kucks' proposition to Catharina a specific mode of division of the property between Grover and Garfield.

5. Their implausible assertion that the inclusion of the tiny $500 additional bequest to the foster grandson of Kucks precludes will number two from being considered as in performance of Kucks' promise, once more in conflict with the view of the trial court.

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5. Their implausible assertion that the inclusion of the tiny $500 additional bequest to the foster grandson of Kucks precludes will number two from being considered as in performance of Kucks' promise, once more in conflict with the view of the trial court.

6. Their refusal ever to consider all of the factors making up appellants' case and insistence upon arguing each part as if it were the whole.

7. Appellees completely ignore the significance of the sacrifices and contributions of Catharina, *outside* the promise to marry, that constituted part performance on her part.

8. Appellees wholly fail to answer our argument as to full performance and its legal effect in the light of the Washington cases cited by us.

9. And, finally, their predominant reliance on cases from other jurisdictions as if this were a question of general law rather than one of the law of the State of Washington.

Accordingly, we renew our prayer for the reversal of the decree of the trial court.

Respectfully submitted,

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Of Counsel:

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No. 13555

United States
Court of Appeals
for the Ninth Circuit.

GEORGE TAKEHARA,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Appellee.

Transcript of Record

**Appeals from the United States District Court,
Western District of Washington,
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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-14-52

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

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For the Plaintiff.

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Asst. U. S. Atty.,
Federal Bldg.,
Tacoma, Washington,

For the Defendant.

In the United States District Court for the Western District of Washington, Southern Division

No. 1482

GEORGE TAKEHARA,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Defendant.

AMENDED COMPLAINT

Comes now George Takehara, plaintiff herein, and for amended cause of action alleges as follows:

I.

That plaintiff George Takehara is now temporarily in Japan, and claims Tacoma, Washington, as his permanent residence in the Western District of Washington, Southern Division.

II.

That Dean G. Acheson is the duly appointed, qualified and acting Secretary of State of the United States; that the American Consul General, Consuls and Vice Consuls at Kobe, Japan, are officials of the Department of State acting under the direction of Dean G. Acheson as Secretary of State of the United States.

III.

That jurisdiction of this action is conferred upon this court by Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A. 903.

IV.

That plaintiff George Takehara is a citizen of the United States by virtue of the Fourteenth Amendment to the Constitution on the ground of having been born in Firwood, Washington, United States of America, on March 13, 1926, and claims his permanent residence as Fife, Washington, where his father and mother reside in the Western District of Washington, Southern Division.

V.

That plaintiff George Takehara desires to return to the United States and did accordingly apply to the American Vice Consul at Kobe, Japan, for an American passport or travel document in order to obtain transportation to the United States and then apply for admission thereto as a citizen of the United States.

VI.

That the Vice Consul of the United States of America at Kobe, Japan, has refused to recognize the American citizenship claimed by plaintiff herein on the ground that the said plaintiff has expatriated himself under the provisions of Section 401 (e) of Chapter IV of the Nationality Act of 1940, 8 U.S.C. 801, by "voting in the Japanese political election of April 5, 1947." That a copy of said certificate is attached hereto marked Exhibit A and incorporated as a part hereof by this reference.

VII.

That plaintiff George Takehara admits that he did vote at the election in Japan as alleged by the

American Vice Consul as set forth in paragraph VI but notwithstanding said section 401 (e) of Chapter IV of the Nationality Act of 1940 (8 U.S.C. 801) claims that he did not thereby become expatriated for the reason that at the time of the said voting in a technical sense Japan was not an independent country, but was then and now under the jurisdiction of the United States and at the time of said election subject to the direct command of General Douglas MacArthur of the United States Army, Supreme Commander for Allied Powers with full jurisdiction over Japan, and in addition the voting at the said election was done pursuant to order of the said MacArthur acting in such capacity. That the voting of plaintiff was not his free and voluntary act, that it was done by plaintiff under duress, coercion, intimidation and under fear of punishment; that he was in fear of losing his ration card and of other punishment by the Japanese authorities if he did not vote.

VIII.

That plaintiff claims United States nationality and citizenship in this action in good faith and on a substantial basis.

IX.

That the expatriation of plaintiff under the provisions of Section 401 (e) of Chapter IV of the Nationality Act of 1940 (8 U.S.C. 801 (e)) would be in contravention of his constitutional rights and said statute should be declared to be unconstitutional.

Wherefore, plaintiff prays for an order and judgment of the court as follows:

1. That an order directed to the defendant Dean G. Acheson issue to provide that the plaintiff be granted a certificate of identity in order that he may be able to obtain transportation to the United States and be admitted under bond in the sum of Five Hundred Dollars ($500.00) for the purpose of prosecuting his claim of citizenship in this court.

2. That a decree be entered herein adjudging plaintiff to be still a citizen of the United States and entitled to all the rights and privileges of a national of the United States.

3. That Section 401 (e) of Chapter IV of the Nationality Act of 1940 (8 U.S.C. 801 (e)) should be declared unconstitutional as contravening the constitutional rights of the plaintiff.

4. That plaintiff herein be granted such other and further relief as may be just in the premises.

/s/ TORU SAKAHARA,

/s/ GERALD SHUCKLIN,
Attorneys for Plaintiff.

EXHIBIT A

Form No. 348
Foreign Service
Established April 1944

Certificate of the Loss of the Nationality of the United States

(This form has been prescribed by the Secretary of State pursuant to Section 501 of the Act of October 14, 1940, 54 Stat. 1171)

Approved by
Department of State
February 23, 1951

Consular Service of the United States of America at Kobe, Japan—ss.

I, D. J. Meloy, hereby certify that, to the best of my knowledge and belief, George Takehara was born at (town or city) Firwood (province, county) (state or country) Washington, on (Date) March 13, 1926;

That he resides at 1103-1 Tannowa-mura, Sennan-gun, Osaka-fu, Japan;

That he last resided in the United States at (Street) Route 12, Box 697, (City) Tacoma, (State) Washington;

That he left the United States on (Precise date should be given) October 28, 1935;

That he acquired the nationality of the United States by virtue of (If a national by birth in the United States, so state; if naturalized, give the

name and place of the court in the United States before which naturalization was granted and the date of such naturalization) birth in the United States;

That he has expatriated himself under the provisions of Section 401 (c) of Chapter IV of the Nationality Act of 1940 by (the action causing expatriation should be set forth succinctly) voting in the Japanese political election of April 5, 1947;

That the evidence of such action consists of the following (here list the sources of information and such documentary evidence as may be available concerning the action causing expatriation of the individual concerned): His sworn statements on Supplement to 213 and Questionnaire both dated February 27, 1950, certified statement from the Japanese Government regarding his voting record.

In Testimony whereof, I have hereunto subscribed my name and affixed my office seal this 11th day of (month) August, 1950.

[Seal] /s/ D. J. MELOY,
Vice Consul of the
United States of America.

Service No. 1219
No Fee Prescribed

Receipt of Copy acknowledged.

[Endorsed]: Filed November 13, 1951.

[Title of District Court and Cause.]

ANSWER

Comes now the above-named defendant and makes his answer to the complaint on file herein as follows:

I.

This defendant denies all the allegations in plaintiff's complaint based on plaintiff's present claim to United States nationality.

II.

This answer is made and filed with defendant's consent given under Rule 15(a) Federal Rules of Civil Procedure, to plaintiff to file an amended complaint, if plaintiff so desires.

Wherefore, defendant prays that plaintiff take nothing by his complaint, and that defendant be hence dismissed with his costs.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

[Endorsed]: Filed July 27, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial on the 20th day of December, 1951, before the court, plaintiff appearing by his counsel Toru Sakahara and Gerald Shucklin, and defendant appearing through his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, evidence, both oral and documentary having been introduced, and plaintiff's trial memorandum on the issues and law having been served and presented to the court and thereafter the defendant's brief and plaintiff's reply brief having been served and presented, and oral argument had on January 24, 1952, and the cause submitted for decision upon the evidence and the respective memoranda on the law, and the court being fully advised and having announced its oral decision, now makes the following:

Findings of Fact

I.

That the plaintiff, George Takehara, was born at Firwood in Pierce County, Washington, United States of America, on March 13, 1926, of Japanese-born parents who were Nationals of Japan, and by virtue of his birth, plaintiff was a citizen of the United States, and by virtue of the nationality of his parents plaintiff was at birth a National of Japan.

II.

That at the approximate age of 4 years, the plaintiff traveled to Japan for a visit with his grandparents on a 1928 passport issued to him when he was 2 years of age, and that after some months there, returned to the United States; that thereafter in the year 1935 at the age of nine years, the plaintiff in company with his older brother, again traveled to Japan to be with his grandparents and other relatives in Japan; that the brother returned to the United States in 1939, and the plaintiff remained in Japan and attended school during his minority and worked on a farm.

III.

That during World War II, the plaintiff was given a physical examination preliminary to serving in the Japanese armed forces, but did not meet the requirements of that service as to weight and height, and was rejected for that reason.

IV.

That plaintiff shortly after attaining his majority voted in the Japanese political election of April 5, 1947, during the military occupation of Japan by the Armed Forces of the United States.

V.

That thereafter on February 27, 1950, approximately three years after voting in said Japanese election, the plaintiff applied to a Vice-Consul of the United States at Kobe, Japan, for a passport as a national of the United States; that such application

was denied as evidenced by Certificate of Loss of Nationality of the United States issued by said Vice Consul August 11, 1950, and approved by the Department of State February 23, 1951, on the ground that plaintiff had expatriated himself under the provisions of Section 401 (e) of Chapter IV of the Nationality Act of 1940 (8 U.S.C.A. 801 (e)) by voting in the Japanese political election of April 5, 1947; and that thereafter on June 6, 1951, the plaintiff instituted this action under 8 U.S.C.A. 903 against the above-named defendant, Dean Acheson, Secretary of State of the United States, in the above-named district in which he claimed his permanent residence, for a judgment declaring plaintiff to be still a citizen of the United States.

VI.

That pursuant to Certificate of Identity No. 8 (1951) issued by the American Consular Service at Kobe, Japan, plaintiff was admitted to the United States under Section 3 (2) of the Immigration Act of 1924 as a temporary visitor for business for such period of time as necessary to prosecute his claim to United States citizenship, and for such time to the residence designated by the immigration service within this district.

VII.

That the evidence before the court reveals that the plaintiff in implicit obedience to his elders and without objection on his part at any time had grown up from early childhood as a Japanese National, completely forgetful of the language, customs and ways

of the land of his birth, and that neither at the time of nor at any time prior to the Japanese political election on April 5, 1947, had he then or on any other occasion asserted his claim to American citizenship or objected to being treated by his elders or the authorities as a Japanese National; and such being the situation and in view of the plaintiff's antecedents, his upbringing and schooling in the language, customs, habits and ways of Japan by those equally unobservant of anything attached or related to his becoming a National of the United States by choice, and in view of his naturalization as a Japanese National and his admitted ignorance of the effect of his voting upon his claim to American citizenship, it must follow that the plaintiff had no reason to abstain from voting in the Japanese political election of April 5, 1947, and did so as a natural consequence of a Japanese National's interest therein, by whatever inducement, and without any relation or reference to his claim to being a National of the United States.

Done in Open Court this .. day of ....., 1952.

/s/ JAMES ALGER FEE,
United States District Judge.

From the foregoing Findings of Fact, the Court now concludes:

Conclusions of Law

I.

That the court has jurisdiction of the subject matter of this action and of the parties hereto.

II.

That the Congress of the United States has the power to determine what acts shall constitute the sovereign's consent to expatriation, and the plaintiff by voting in the Japanese political election of April 5, 1947, lost his United States Nationality by reason of Title 8, U.S.C.A., Section 801, which so provides.

III.

That the plaintiff's action herein should be denied and dismissed, and that the defendant is entitled to recover his costs, and judgment should be entered accordingly.

The plaintiff, by counsel, has excepted to each and every adverse finding of fact and conclusion of law of the court hereinabove set forth, and said exceptions are hereby allowed.

Done in Open Court this .. day of ....., 1952.

/s/ JAMES ALGER FEE,
United States District Judge

Proposed and Presented by:

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

Lodged April 7, 1952.

Entered August 9, 1952.

[Endorsed]: Filed August 9, 1952.

United States District Court, Western District of Washington, Southern Division

No. 1482

GEORGE TAKEHARA,

Plaintiff,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Defendant.

JUDGMENT OF DISMISSAL

This cause having come on regularly for trial on the 20th day of December, 1951, before the Court, plaintiff appearing by his counsel, Toru Sakahara and Gerald Shucklin, and defendant appearing through his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, evidence both oral and documentary having been introduced, and plaintiff's trial memorandum on the issues and law having been served and presented to the Court, and thereafter the defendant's brief and plaintiff's reply brief having been served and so presented, and oral argument had on January 24, 1952, and the cause submitted for decision upon the evidence and the respective memoranda of the parties on the law, and the court being fully advised in the premises, and having heretofore on this day made and entered its Findings of Fact and Conclusions of Law wherefrom it appears that the plaintiff is not entitled to

the relief prayed for in his complaint; now therefore, and in conformity therewith, it is hereby:

Ordered, Adjudged and Decreed that plaintiff's complaint be and the same is hereby denied and this action dismissed; and the defendant be and he is hereby allowed judgment for his costs amounting to $23.00.

The plaintiff, by his counsel, has excepted to each and every adverse ruling of the court hereinabove set forth, and said exceptions are hereby allowed.

Done in Open Court this .. day of ....., 1952.

/s/ JAMES ALGER FEE,
United States District Judge.

Proposed and Presented by:

/s/ GUY A. B. DOVELL,
Assistant United States Attorney.

Lodged April 7, 1952.

Entered August 9, 1952.

[Endorsed]: Filed August 9, 1952.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial on the 20th day of December, 1951, before the court, plaintiff appearing by his counsel Toru Sakahara

and Gerald Shucklin, and defendant appearing through his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, evidence, both oral and documentary having been introduced, and plaintiff's trial memorandum on the issues and law having been served and presented to the court and thereafter the defendant's brief and plaintiff's reply brief having been served and presented and oral argument had on January 24, 1952, and the court being fully advised, now makes the following:

Findings of Fact

I.

That the plaintiff, George Takehara, was born at Firwood, in Pierce County, Washington, United States of America, on March 13, 1926, of Japanese-born parents who were Nationals of Japan, and by virtue of his birth, plaintiff was and is a citizen of the United States.

II.

In 1935 the plaintiff George Takehara went to Japan with his brother Shoichi Takehara, who subsequently died in action as a member of the United States Armed Forces in Europe; in Japan they resided with their grandparents; in 1939 said brother Shoichi Takehara was recalled by their father to return to the United States; that it was the father's plan to have plaintiff George Takehara return to the United States at a later time; that plaintiff attended school in Japan during his minority and worked on a farm.

III.

During his stay in Japan plaintiff was not registered as a Japanese citizen except as hereinafter stated; that after Japan was at war with the United States plaintiff, as an American citizen, was required to and did report as an enemy alien to the Japanese police; that he was cautioned by the said police to obtain a permit to travel and forbidden to possess or carry a camera; that plaintiff's relatives exerted pressure on him to register with the Japanese authorities as a Japanese citizen on the ground it would relieve the family of stigma of an enemy alien relative; that plaintiff declined to register, but without his permission his cousin registered his name with the Japanese authorities.

IV.

That plaintiff attended school in Japan for nine years and did not have the benfit of English instruction as it was forbidden during the war years; that plaintiff was educated in a family and social background requiring implicit obedience to his elders, superiors and government authority and believed that failure to obey would be punished.

V.

That the plaintiff voted in a Japanese election on April 5, 1947, less than one month after he had become twenty-one years of age under the following circumstances: that there was an extensive campaign by radio and press urging everyone to vote; that the neighborhood governmental representative, known as the block leader, made a house-to-house canvass to get everyone to vote; that in the presence

of plaintiff the block leader told the members of plaintiff's grandfather's household to go to the polls to vote; that plaintiff's grandfather told plaintiff after going to the polls himself that Japanese police and American military police were at the polls and that if plaintiff did not vote he might get into trouble and lose his food ration card; that plaintiff's uncle told plaintiff that he was going to the polls and that plaintiff should come with him and vote, otherwise plaintiff would be punished and lose his ration card; that plaintiff went with his uncle to vote and saw armed American Military Police and Japanese police; that plaintiff did not know voting would cause loss of his citizenship; that plaintiff voted because of fear of punishment, duress, coercion and did not exercise a free, voluntary and intelligent choice.

VI.

That at the time of plaintiff's voting Japan was occupied by the United States and other United Nations armed forces.

VII.

That plaintiff's family consists of the following, all residing in Fife, Pierce County, Washington:

Yutaro Takehara, Father

Oito Takehara, Mother

Mitsuo Takehara, aged 20, brother, now in United States Army, American citizen

Sachiko Takehara, aged 13, Sister, American citizen

Takeo Takehara, aged 7, Brother, American citizen.

VIII.

That plaintiff was prevented from returning to the United States, which he wished to do, because of World War II; that after the termination of hostilities plaintiff went to the foreign office of the Governor of Osaka Province and was told that an American Consulate would be established in Kobe and that he should wait until that time; that later when said consulate was established plaintiff went there as an American citizen to apply for a travel document for the purpose of returning to the United States; that said application was denied and plaintiff brought this action under 8 U.S.C.A. 903, against the defendant in this district where plaintiff claims his permanent residence, for a judgment declaring plaintiff to be still a citizen of the United States; that plaintiff was allowed to come to the United States for the purpose of prosecuting this action.

Done in Open Court this .. day of ....., 1952.

.....

United States District Judge.

From the foregoing Findings of Fact, the court concludes:

Conclusions of Law

I.

That plaintiff George Takehara is entitled to have his United States citizenship confirmed by an appropriate decree of this Court which has jurisdiction under section 503 of the Nationality Act of 1940, Title 8, U.S.C.A. Section 903.

II.

That the voting by George Takehara in a Japanese election on April 5, 1947, was done by him through fear of punishment, duress and coercion, and was not a free and voluntary act nor a free and intelligent act.

Done in Open Court this . . day of ....., 1952.

.....
United States District Judge.

Proposed and Presented by:

/s/ TORU SAKAHARA,

/s/ GERALD SHUCKLIN,
Attorneys for Plaintiff.

Lodged April 10, 1952.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED DECLARATORY JUDGMENT OF CITIZENSHIP

This matter having come on to be heard before the undersigned Judge of the above-entitled Court upon the application of the plaintiff, George Takehara, under Title 8 U.S.C.A., Sec. 903, for a judgment declaring him to be still a citizen of the United States and the matter coming on regularly for hearing, the petitioner appearing in court both personally and through his counsel, Toru Sakahara and Gerald Shucklin, and the defendant appearing

through J. Charles Dennis, United States District Attorney, and Guy A. B. Dovell, Assistant United States Attorney, and the court having listened to the evidence introduced on behalf of the plaintiff and considered arguments, statements and briefs of counsel and having fully considered the matter and having heretofore filed its Findings of Fact and Conclusions of Law; now, therefore, it is hereby

Ordered, Adjudged and Decreed, that the plaintiff, George Takehara, is hereby declared to be still a citizen of the United States, by reason of birth in the United States, under the Fourteenth Amendment to the Constitution of the United States.

This judgment is made pursuant to and under the authority of Section 503 of the Nationality Act of 1940, Title 8 U.S.C.A., Section 903.

Done in open Court this .... day of ....., 1952.

.....
United States District Judge.

Proposed and Presented by:

/s/ TORU SAKAHARA,

/s/ GERALD SHUCKLIN,
Attorneys for Plaintiff.

Lodged April 10, 1952.

[Title of District Court and Cause.]

OPINION

January 24, 1952

James Alger Fee, District Judge:

A certificate of Loss of Nationality of the United States as to George Takehara was issued by the Vice-Consul of the United States at Kobe, Japan, on August 11, 1950, and approved by the Department of State on February 25, 1951. Upon this basis, his application for passport as a national of the United States was denied. The above-entitled action was instituted on June 26, 1951, on the allegation that the issuance of this passport was a right or privilege claimed by plaintiff as a national of the United States and denied by a department, agency of the government or an executive official thereof. The Secretary of State was named defendant as the head of the department or agency. He entered the United States upon the statutory certificate of identity provided in such cases.[1]

The case was heard in open court. Plaintiff, upon whose testimony the case is based, largely testified through an interpreter. A good deal of his examination indicated to the Court that he was highly evasive, if not false in his testimony. Whenever the shoe pinched, he had a ready remedy.

There is no doubt of the fact that Takehara voted in a Japanese election. There is no doubt that he knowingly cast a ballot. He was not physically con-

[1] 8 U.S.C.A., § 903.

strained to do so. He testified only that his uncle and grandfather each suggested to him that he might lose his ration card if he did not vote. There was no proof offered that anyone ever lost a ration card for that reason.

Japan, at the time in question, although under military occupation by United States troops, was a foreign state. Congress had the power to enact a law that established the acts which, if knowingly and voluntarily done, would constitute a renunciation of citizenship.[2] Such statutes[3] are constitutional.

Citizenship by birth in the United States cannot be renounced except by voluntary act of the citizen.[4] But the act done voluntarily may result in renunciation even though it be neither a formal disclaimer nor express acceptance of allegiance to a foreign power or potentate. The act which causes loss of citizenship may be specified by enactment of congress. Although the act must be voluntary to accomplish the result, the citizen, while doing the act voluntarily, need not know that citizenship will be lost thereby in order to bring about that result.[5]

[2]"Congress has the power to say what act shall expatriate a citizen." United States ex rel Wrona vs. Karnuth, 14 F. Supp. 770, 771; Mackenzie vs. Hare, 239 U.S. 299.

[3]8 U.S.C.A. § 801(a)(e).

[4]Perkins vs. Elg, 307 U.S. 325, affirming 99 F. 2d 408. See also in re Reid, 6 F. Supp. 800, reversed 73 F. 2d 153, but recognized in Perkins vs. Elg, at page 349, note 31.

[5]Savorgnan vs. United States, 338 U.S. 491; Boissonnas vs. Acheson, 101 F. Supp. 138.

The only question is one of fact.[6] Most courts seem to have attempted to repeal the statute by a "liberal" interpretation of the word "voluntarily." With these interpretations, the Court does not agree.

In any event, in this case the Court finds the act of voting was voluntarily done. Takehara applied for Japanese citizenship on January 12, 1943, when he was sixteen years and ten months of age. The petition was granted some weeks later. The Court does not accept the statement that he was registered without his consent. He was treated as a Japanese national and was given a physical examination preliminary to serving in the Japanese armed forces, but was rejected because he did not meet the requirements as to weight and height. Shortly after attainment of his majority, Takehara voted in a Japanese political election on April 5, 1947. About three years thereafter, plaintiff, when about twenty-four years old, applied to a Vice-Consul of the United States for a passport as a national of the United States. This petition was denied on the ground that Takehara had expatriated himself by voting in this 1947 election.

The Court does not accept the story that he voted because he feared the loss of his ration card, but does believe that plaintiff obeyed a direction of his grandfather and uncle, both citizens of Japan, to vote at the election and that he did not know that

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[6]Kawaleita vs. United States, 72 Sup. Ct. 950. See also Acheson vs. Okimura, 72 Sup. Ct. 293, and Acheson vs. Murata, 72 Sup. Ct. 294.

the act would cause his expatriation. In any event, the fear of loss of a food rationing card is not sufficient to raise the doctrine of duress in commercial transactions, and no good reason is seen why it is acceptable in an important transaction of this type.

But, if that were not the case, Takehara lost his citizenship by his conduct of which voting is a minor factor. He was born in the United States in 1926. A passport was issued to him when he was two years old, and upon this he was taken to Japan where he remained for some months. In 1935, when nine years old, he again was taken to Japan to be with his grandparents and other relatives, and has ever since remained there until brought to this country to prosecute this case. He was brought up with the native Japanese tradition and educated in a family and social background requiring implicit obedience to his elders and the Imperial Government of the Emperor. He was educated exclusively in Japanese schools and, upon failure to obtain a sufficient mark to become an officer in the Japanese army, served as teacher in the official schools. He has no education in English or training in our form of government.

Against this background, his actions indicate a definite choice of Japanese citizenship exercised after he had attained majority. American citizenship by birth cannot be lost involuntarily, but it can be lost by voluntary conduct after majority by one who, by virtue of his residence, his official registra-

tion, his ancestry and members of his family, is entitled to Japanese citizenship.[7]

The mere fact that the elders of the Japanese clan to which plaintiff belongs have now decided that he should seek to recoup this birthright which he has renounced and that he has obeyed them is of no consequence. Since responsibility is individual, as well as allegiance, it would seem impertinent that a brother of plaintiff was killed in our service during the war and that another is presently in the army.

In this day of conflicting ideologies, the courts would be remiss if, for the purpose of indicating a lack of race prejudice, there were a deviation by rationalization from the statutes enacted by congress for protection of the country.

The petition is denied (1) because plaintiff's actions show clearly that he chose Japanese citizenship after arriving at majority, and (2) because he renounced American citizenship in the manner prescribed by acts of congress by voluntary voting at a Japanese election.

[Endorsed]: Filed July 24, 1952.

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[7]United States vs. Yasui, 48 F. Supp. 40, 54, affirmed on other grounds, 320 U.S. 115.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Dean G. Acheson, Secretary of State of the United States; and J. Charles Dennis, United States Attorney, and Guy A. B. Dovell, Assistant United States Attorney.

Notice is hereby given that George Takehara, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 9th day of August, 1952.

/s/ GERALD SHUCKLIN,

/s/ TORU SAKAHARA,
Attorneys for Appellant,
George Takehara.

[Endorsed]: Filed August 19, 1952.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That the undersigned, George Takehara, plaintiff in the above-entitled action, as principal, and the United Pacific Insurance Company, a corporation, organized under the laws of the State of Washington, and authorized to transact the business of surety, as surety, are held and firmly bound unto the United States of America for the benefit of whom-

soever it may concern in the penal sum of Two Hundred Fifty and no/100 ($250.00) Dollars, lawful money of the United States, for the payment of which well and truly to be made, the said principal and the said surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of August, 1952.

Whereas, on the 9th day of August, 1952, the above-entitled court rendered and entered a judgment in the above-entitled cause and against the above-named principal, and

Whereas, the said plaintiff feeling aggrieved by said judgment and desiring to appeal from the same to the United States Court of Appeals, Ninth Circuit; and perfect said appeal by this bond.

Now, Therefore, the condition of the obligation is such that if the said appellant will pay all costs and damages that may be awarded against him on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty and No/100 ($250.00) Dollars, then this obligation shall be void, otherwise to remain in full force and virtue.

GEORGE TAKEHARA,

By /s/ GERALD SHUCKLIN,

By /s/ TORU SAKAHARA,

His Attorneys.

[Seal] UNITED PACIFIC INSURANCE COMPANY,

By /s/ A. L. WING, JR.,
Attorney-in-Fact.

Countersigned:

By /s/ W. E. EVANS,
Resident Agent,
Seattle, Wash.

[Endorsed]: Filed August 19, 1952.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS ON APPEAL

The following is a statement of Points on which appellant intends to rely on appeal:

I.

That the Court erred in not adjudging and not finding that George Takehara is a citizen of the United States of America.

II.

That the Court erred in not finding and not adjudging that the voting of George Takehara in the April, 1947, election in Japan was done because of fear of punishment, duress or coercion and the Court erred in not adjudging and not finding that such voting was not the free, voluntary and intelligent choice of George Takehara.

III.

That the Court erred in rejecting the doctrine of duress as applied to voting in foreign political elections.

IV.

That the opinion, findings of fact, conclusions of law, and judgment of dismissal entered by the Court are contrary to evidence and contrary to the law governing the case.

V.

That the Court erred in not finding and not adjudging that Japan was not a foreign state at the time of the said election under Title 8 U.S.C.A., Section 801(e).

VI.

That the Court erred in not finding and not adjudging Title 8 U.S.C.A., 801 (e), as in contravention of his constitutional rights.

VII.

That the Court erred in refusing to make and enter plaintiff's proposed findings of fact, conclusions of law and erred in refusing to make and enter plaintiff's proposed Declaratory Judgment of Citizenship.

/s/ TORU SAKAHARA,

/s/ GERALD SHUCKLIN,

Attorneys for Plaintiff and Appellant George Takehara.

Receipt of copy acknowledged.

[Endorsed]: Filed August 29, 1952.

In the District Court of the United States for the Western District of Washington, Southern Division

No. 1482

GEORGE TAKEHARA,

Plaintiff,

vs.

DEAN C. ACHESON, Secretary of State of the United States,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: James Alger Fee, United States District Judge.

Appearances:

TORU SAKAHARA, ESQ., and
GERALD SHUCKLIN, ESQ.,
Appeared on Behalf of Plaintiff.

GUY A. B. DOVELL, ESQ.,
Assistant United States Attorney,
Appeared on Behalf of Defendant.

Whereupon, the following proceedings were had, to wit:

The Clerk: Cause No. 1482, George Takehara vs. Dean Acheson, Secretary of State, trial to the Court. Toru Sakahara and Gerald Shucklin for the Plaintiff and Guy A. B. Dovell for the Defendant.

The Court: You may proceed.

Mr. Shucklin: Your Honor, may I submit plaintiff's memorandum of authorities? I have given a copy to counsel for the defendant. May it please the Court, the evidence will show in this case that the plaintiff, George Takehara, of Japanese ancestry was born in Firwood in this county in the State of Washington on March 12, 1926, and is a citizen of the United States by virtue of the Fourteenth Amendment to the United States Constitution; that he claims his permanent residence is with his father and mother in Fife, just outside of Tacoma in this county. The evidence will further show that his family consists of his father, his mother, a brother, age twenty-one, who is in the United States Army, a sister age, thirteen, attending school, a brother, age seven, attending school; that all of these children live with their parents with the [2*] exception of the boy in the Army, at Fife. The father is a farmer. Another brother, who is now deceased, was killed while a member of the United States Armed Forces, killed in action in Europe in April of 1945. In 1936, when the plaintiff was nine years old, he and the brother who was later killed in action, were sent by their father to Japan to be with their grandparents. There were certain reasons for sending them to be with the grandparents. The grandparents were lonely and the father wanted the boys to be educated in both languages. In 1939 both brothers were to return to Tacoma or Fife, but after consideration by the father, because the grandfather and the grandmother were getting more infirm, it was decided that George, the plaintiff, should re-

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

main to take care of them on the farm awhile and that the other brother should return. So the plaintiff stayed with the grandparents and his brother came back to the United States. Now, George Takehara's schooling in Japan consisted of six years of primary school and three years in middle school, which apparently coincides with our junior high school. [3] During the war he went to an electrical school, but did not become an electrician but remained a farmer. The evidence will further show that he was educated and brought up where obedience was instilled in him and that disobedience meant strict disciplinary measures which could be taken by one higher up in the family or a higher official, or one in a higher social position. The evidence will further show that the Japanese authorities were very strict during the war and, for example, the plaintiff, although he never served in the Japanese armed forces, he was called up for a physical examination. Before the examination commenced he was asked to give his height and weight. When he was actually measured and weighed, the results were somewhat different from what he said and for giving incorrect information the plaintiff was slapped and struck by the military authorities. And the evidence will further show that also, for instance, anyone wearing white clothing during an air raid was struck and beaten by the authorities. The evidence will further show that at no time did the plaintiff have any [4] intention whatsoever to lose or give up his American citizenship. The evidence will further show that the plaintiff intended

to come back to the United States at his first opportunity after the war. Now, during the war, the evidence will show that he was considered to be an alien because he was born in the United States and he was required to report to the authorities. His relatives remonstrated with him and wanted him to register his birth with the authorities. However, he did not want to do it and one of the members of his family actually registered him. This later gave him a basis on which to vote in a Japanese election. After the war was over he went to the office of the Japanese Governor in his district to see about returning to the United States, but he was told at that office that there would be an American consulate open at Kobe which was near Osaka where he lived and that he should wait. So later when an American consulate was established at Kobe, he went there and made application for a travel document to come to the United States. The evidence will further show that prior to the Japanese elections in 1947 [5] the Japanese people were told by newspaper, radio and political speeches that in order to build a new Japan and a democratic country everyone should vote; that this was reiterated over and over again. The plaintiff was advised that it was his duty to vote and under Japanese authority that meant that obedience was virtually automatic. Now, on the day of the elections he was told by his grandfather to go to vote. The grandfather was the head of the household and had authority over him, and that if he didn't vote, otherwise he might lose his ration card. He also was

told this by his uncle who lived in, I think, the next house, Mr. Seiji Fujihara, who told him to go to vote, that otherwise he would lose his ration card and receive other punishment. In addition to that, on election day the liaison people came around and urged that he vote. Comittees of school children came and asked that he vote. In addition to that, the head of his block came and advised him to vote. Now under the system over there, every year the heads of ten or so houses get together and elect one to act as head of that particular [6] neighborhood block. It was this block captain, so-called, who was a representative of the Japanese authorities who came to him and told him to go to the polls. When he went to the polls and prior to going to the polls, he heard that American military police were there. The evidence will further show that the plaintiff did not exercise his free and intelligent choice in voting but that the voting was done under duress. The evidence will further show that neither did he intend to lose his American citizenship, nor did he know that he would lose his American citizenship if he voted. The evidence will further show that the first time he learned that his citizenship was in jeopardy was when he made application to the American consulate at Kobe, Japan, for authority to come to the United States. After he was refused this travel document on the grounds of expatriation by reason of voting in a foreign state, this particular action was brought under Title 8 U.S. Code, Section 903, which in general provides that if anyone who claims a right as a national of the

United States and is denied [7] that privilege by an official of the United States, he has a right to institute an action in the District Court of his permanent residence for a judgment declaring him to be a national of the United States, after which the plaintiff has a right to come to the United States for the purpose of prosecuting his action. And he was allowed to come to the United States for the purpose of prosecuting this action. It is our contention that the plaintiff is an American citizen by reason of birth and that he never expatriated himself. The particular statute involved is Title 8, U.S. Code Annotated, Section 801, which states in part: "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; * * * ." Now the plaintiff in this case can prevail if the Court finds one, two or all of the following propositions: (1) that plaintiff was not in a foreign state at the time of the elections or that the plaintiff voted under duress, or that Title 8, [8] U.S. Code Annotated, Section 801, is unconstitutional. I don't assume, your Honor, that you wish me to go into the legal propositions at this time?

The Court: No.

Mr. Shucklin: Your Honor, in our memorandum of authorities, we refer to a State Department publication called "Occupation of Japan" which we offer for your use in this case if your Honor wishes

to refresh your judicial notice on any of the subjects concerning instrument of surrender, allied authority, Japanese Bill of Rights, the Japanese draft of the constitution, and in my memorandum of authorities I have the page references, your Honor.

The Court: Yes, I noticed it.

Mr. Shucklin: I might state in order to shorten the issues here and the argument, that the Circuit Court of Appeals of this particular circuit decided in Kuniyuki vs. Acheson, 189 Fed. 2d, p. 741, that in effect Japan was a foreign state. Your Honor, it will be necessary to use an interpreter. May I have the interpreter sworn at this time? [9]

FRANK HATORI

being first duly sworn on oath, was called as an interpreter on behalf of plaintiff, and all testimony hereafter given by plaintiff, shall be considered correctly interpreted by said interpreter.

The Court: Will you place a chair for the interpreter?

Mr. Shucklin: I'd like to call Mr. Yutara Takehara. It will not be necessary to use an interpreter with this particular witness, your Honor. [10]

YUTARO TAKEHARA

being first duly sworn on oath, was called as a witness on behalf of plaintiff, and testified as follows:

Direct Examination

By Mr. Shucklin:

Q. State your name please,

A. Yutaro Takehara.

The Court: Speak up.

Q. Will you please state your name?

A. Yutaro Takehara.

Q. Where do you reside; where do you live?

A. Now?

Q. Yes. A. Fife, Washington.

Q. Is that in Pierce County? A. Yes.

Q. And how long have you lived there, Mr. Takehara? A. Since 1920.

Q. You have lived in Pierce County since 1920?

A. Well, I have lived in Firwood.

Q. Is that in Pierce County? A. Yes.

Q. And then when did you move to Fife?

A. Oh, around 1920.

Q. Of what does your family consist? [11]

A. What?

Q. I will clarify that. Do you have a wife?

A. Yes.

Q. And does she live with you? A. Yes.

Q. And how many children do you have now?

A. Four right now.

Q. And will you give their names and ages.

(Testimony of Yutaro Takehara.)

A. From the oldest?

Q. Any way.

A. George Takehara, then Mitsuo Takehara, Sachiko and Takeo Takehara.

Q. Will you tell us, how old is George?

A. Twenty-five.

Q. And where was George born?

A. Born in Firwood, Washington.

Q. On what date? A. March 13, 1926

Q. 1926? A. Yes.

Q. Do you see him in the courtroom?

A. Today?

Q. Your son George. A. Today?

Q. Yes. A. Yes, right there. [12]

Q. Do you see him in the courtroom?

A. Yes.

Q. Would you point out the man who is your son George? A. The first from the left.

Q. Would you ask him to stand up?

A. George, stand up.

(Whereupon, George Takehara stood up.)

Q. That is your son? A. Yes.

Q. Now, what does Mitsuo Takehara, one of your sons do? A. He is in the army right now.

Q. And how old is he? A. Twenty-one.

Q. And he is in the courtroom today?

A. Yes.

Q. And how old is Sachiko? A. Thirteen.

Q. That is a daughter? A. Yes.

Q. And Takeo? A. That is a boy.

Q. A son, and how old?

(Testimony of Yutaro Takehara.)

A. Seven years old.

Q. Would you speak a little louder, please. Did you [13] have another child? A. No.

Q. Did you have another son who died?

A. Yes.

Q. And what was his name?

A. Shoichi Takehara.

Q. And how did he die?

A. He died in action in Europe.

Q. While he was in the Army? A. Yes.

Q. In what year? A. In 1945.

Q. What is the permanent residence of your son George Takehara?

A. What does that mean? I don't quite understand.

Q. Where does your son live? George, where does he live now? A. Now, at Fife.

Q. He is with you now? A. Yes.

Q. Did you ever send your son George to Japan?

A. Yes.

Q. And in what year? A. 1935.

Q. And how old was he? [14]

A. He was nine years old.

Q. Did you send anyone else with him at that time? A. Yes.

Q. And who? A. Shoichi.

Q. Your son, Shoichi? A. Yes.

Q. How old was he at that time?

A. He was eleven years old.

Q. And for what reason did you send them to Japan?

(Testimony of Yutaro Takehara.)

A. For schooling and for the parents were kind of lonesome and wanted me to send them over.

Q. Your parents, your father and mother?

A. Yes.

Q. And where did they live?

A. They lived in Tannowa-mura, Sennan-gun, Osaka-fu, Japan.

Q. Did you have any intention that they come back to live with you? A. Yes.

Q. And when were they to come back?

A. Well, Shoichi come back in 1939.

Q. And how about—did you make any arrangements to have George come back?

A. Yes, but at that time I was bringing two boy with [15] me, but grandparent was kind of lonesome so he wanted me to leave one son there and bring one with me.

Q. Is that what you did? A. Yes.

Q. Did you obey your parents then?

A. Yes.

Q. And how long did you intend for him to be there then after that?

A. Well, I was figuring about a couple of years or so.

Q. Then he was to come back home?

A. Yes.

Q. Did you also consider that your home was his home? A. Yes.

Q. That he was just there temporarily?

A. Yes.

(Testimony of Yutaro Takehara.)

Q. Did you later then make arrangements to have George come back?

A. Well, I was trying to, but started war so I can't do anything.

Q. Because of the war, and then after the war what did you do?

A. I was trying to make arrangements, but was pretty hard to.

Q. Did you do anything? [16] A. Yes.

Q. Did you register the birth of any of your children in Japan? A. Yes.

Q. Which ones? A. Well, two of them.

Q. And who were they?

A. George and Shoichi.

Q. You didn't register George yourself?

A. No.

Q. But Shoichi was? A. Yes.

Q. Did you withdraw the registrations?

A. Yes.

Q. When did you do that?

A. It was about 1930.

Q. In 1930 you withdrew the registrations?

A. Yes.

Q. Let's see, how old would George be then, at that time, four years old?

A. Four years old, yes.

Q. You withdrew it from the Japanese registry, is that right? A. Yes.

Q. And you gave George an American first name, didn't [17] you? A. Yes.

Q. Did you give him a Japanese first name?

(Testimony of Yutaro Takehara.)

A. No.

Mr. Shucklin: That is all, you may question.

The Court: You may be excused from the stand.

(Whereupon, witness was excused.)

The Court (Continuing): I have some more matters to take up.

(Whereupon, other matters were considered.)

The Court: Recall the witness, you may proceed.

YUTARO TAKEHARA

having been previously sworn on oath, was recalled as a witness on behalf of plaintiff and testified as follows:

Further Direct Examination

By Mr. Shucklin:

Q. How long have you lived in the United States, Mr. Takehara? A. Since 1908.

Q. 1908? A. Yes.

Mr. Shucklin: You may examine.

Cross-Examination

By Mr. Dovell:

Q. Mr. Takehara, I understood you to testify that George and another of your sons went to Japan. In [18] what year did you say?

A. 1935.

Q. 1935? A. Yes.

Q. And how did they travel, on what papers did they travel?

(Testimony of Yutaro Takehara.)

A. They traveled on a boat.

Q. Did they have a passport? A. Yes.

Q. What was the date of that passport, do you recall? Was it taken out just before they left?

A. Yes.

Q. In 1935?

A. Yes—no, that passport was—we went back to Japan when George was a little boy, you know. The first we went back we had a passport that time and after the second trip they didn't have any passport with them.

Q. You mean you went back on a first trip on a passport? A. Yes.

Q. What year was that?

A. That was—I am not—I can't tell exactly what year.

Q. Would you say it was 1928, six or seven years before? A. Yes. [19]

Q. And that time you took the boys with you to Japan? A. Yes.

Q. How many? A. Two.

Q. The same two that went later, that is, George and his brother? A. Yes.

Q. And what did you do with them then, bring them back with you? A. Yes.

Q. And then it was later, in 1935, that you sent them to the grandparents? A. Yes.

Q. And at that time no passport was required?

A. No, we had the first passport so they take that with them.

Q. Showed that first passport? A. Yes.

(Testimony of Yutaro Takehara.)

Q. At the second trip had the boys been going to school before that time? A. Yes.

Q. Had they learned to speak English?

A. Yes.

Mr. Dovell: I believe that is all.

Mr. Shucklin: That is all.

(Witness excused.) [20]

GEORGE TAKEHARA

being duly sworn on oath, was called as a witness on his own behalf and testified through an interpreter as follows:

Direct Examination

By Mr. Shucklin:

Q. State——

The Court: I want to ask him, does he recognize the validity of that oath?

Interpreter: Yes, I believe so, your Honor.

The Court Don't tell me, you don't know. Ask him.

The Witness: Yes.

The Court: Is he a Christian?

The Witness: No.

The Court: What is his religion?

The Witness: Buddhist.

The Court: Does a Buddhist recognize the validity of the oath as just administered?

The Witness: I will recognize it.

The Court: But is there a form of oath accord-

(Testimony of George Takehara.)

ing to his Buddhist religion which is more binding upon him than this formal oath?

The Witness: I will think it is about the same.

The Court: In any event he recognizes that this oath subjects him to the penalties of perjury in the event that he doesn't tell the truth? [21]

The Witness: Yes, I understand.

The Court: All right, you may proceed.

Q. What is your name?

A. George Takehara.

Q. What is your permanent residence?

A. Fife, Washington.

Q. Was that his permanent residence at the time this action was commenced, this case was commenced? A. Yes.

Q. With whom does he reside at Fife, Washington? A. My parents and sister and brothers.

Q. What is your father's name?

A. Yutaro Takehara.

Q. Is he the gentleman who just testified prior to his getting on the stand? A. Yes.

Q. When and where were you born?

A. Firwood, Washington, 1926.

Q. What date? A. March 13, 1926.

Q. 1926? A. Yes.

Q. Are you an American citizen by birth?

A. Yes.

Q. How long did he live in the United States prior to going to Japan? [22]

A. Nine years.

Q. When did you go to Japan?

(Testimony of George Takehara.)

A. November, 1935.

Q. And with whom did he go to Japan?

A. My brother, Shoichi.

Q. With whom did you and your brother stay when you were in Japan?

A. My grandfather and grandmother.

Q. Were you taught to be obedient to your grandparents? A. Yes.

Q. And did you do the things that were requested by your grandfather or ordered by your grandfather? A. Yes.

Q. Were you taught to obey your parents, grandparents and governmental authorities?

A. Yes.

Q. If you were not obedient did you believe that you would be disciplined? A. Yes.

Q. Did you attend school in Japan?

A. Yes, I went.

Q. How many years? A. Nine years.

Q. Was he taught English, were you taught English? [23] Were you taught English during that period? A. No, they never taught me.

Q. How long did your brother stay in Japan?

A. I believe about four years.

Q. Did you ever serve in the Japanese Army?

A. No.

Q. Was he ever called up for a physical examination? A. Yes.

Q. Will you tell what transpired during that examination? A. Yes.

(Testimony of George Takehara.)

Q. Please relate what happened during the examination.

A. When I went to the examination I noticed that Japanese orders were very strict. Whatever I said if it was wrong they kicked me and struck me and myself I be struck about four times.

Q. And what was the reason that you—for what reason was he struck?

A. Well, they measured my height and it was wrong what I said before. Therefore they call me a liar and struck me. When they ask me some questions my voice was a little hard to hear they told me and at the same time they struck me again.

The Court: What had he said before about his height? [24]

The Witness: I be struck about four times.

The Court: No, I didn't ask him that. I said what did he say before about his height that was proven wrong?

The Witness: They ask me just what my height is and I say just about so high.

The Court: How high?

The Witness: 1.57 meter.

The Court: What did it turn out to be when they measured him?

The Witness: I don't exactly remember what I said, but anyway it was wrong and I was very—they struck me again and they scold me at that time. I can't remember exactly what I said how high I was.

The Court: Isn't it a little strange that he

(Testimony of George Takehara.)

doesn't remember an important incident like that?

The Witness: I don't remember.

The Court: All right.

Q. Do you remember the difference in meters between the height you stated and the height they measured? A. About 10 centimeter.

Q. I don't get that?

The Court: Ten centimeters. [25]

Q. (Continuing): Taller or shorter?

A. Shorter.

Q. They measured you shorter?

A. Yes, I said it a little taller than actually myself.

Q. Do you recall what disciplinary measures were taken by Japanese authorities against anyone wearing white clothing during an air raid?

A. Yes, I do know.

Q. What measures were taken?

A. Well, the military police and the regular city police were after me and told me off that I was wearing wrong.

Q. What did they do?

A. At that time I was scold and was told to change my suit, but I didn't have anything to change so I was asked to stay at a particular spot.

The Court: White clothing is the costume of mourning, isn't it?

The Witness: Does white clothing mean something like shirts?

The Court: I am not answering questions for

(Testimony of George Takehara.)

you. Answer my question. Isn't that the costume of mourning in Japan?

The Witness: Yes, we wear during the summer season.

Q. I think the question meant mourning for a dead [26] person.

The Witness: They wear black clothing.

The Court: Oh, isn't it true that General MacArthur made the Japanese envoys asking for an armistice come to the Philippines in a white airplane?

The Witness: I don't know.

The Court: As a matter of fact they refused to come and he insisted that he wouldn't receive them unless they came in a white airplane. Doesn't he know that?

The Witness: I don't know.

The Court: Does he mean to say that he doesn't know that the custom of wearing white clothing is the custom of mourning or defeat in Japan?

The Witness: Well, sometime ago I understand that somebody died, if he or she is a very close relative such as husband, the wife used to wear white clothing meaning that she wouldn't be remarried again.

The Court: All right, let's go ahead.

Q. During the war was your birth registered with the Japanese authorities? A. Yes.

Q. And at whose request? [27]

A. My grandmother asked my cousin to register.

Q. And for what reason?

(Testimony of George Takehara.)

A. At that time I was a foreigner and twice a year I was to report to the police station. The police told me that since I am a foreigner that every time I travel, even for a day, I have to make a report and I am not to carry any camera at all.

Q. Did your relatives request that this be done?

A. All my relatives urged me to register, also the village officer asked me to register.

Q. And what was his authority?

A. I do not know what his authority is, but he was working in registration department.

Q. Did his relatives feel it was a disgrace on the family because he was an alien?

A. I believe they did.

Q. Did you ever intend to lose your American citizenship? A. No, I have not.

Q. Did you, although the war was on between Japan and the United States, did you intend to come back to the United States and be with your family as an American citizen?

A. Yes, I was thinking about it all the time.

Q. After the war was over did you make any efforts to [28] get in touch with your family about coming back to the United States?

A. Yes, I have.

Q. And what did you do?

A. I didn't know exactly what to do, but right after the war my parents sent me a letter to come back to the United States immediately. Therefore I went to the Foreign Department in the Governor's office and asked them what to do.

(Testimony of George Takehara.)

Q. And then was that before he became twenty-one years of age?

A. I think I was twenty-one then.

Q. Now, what was he told at the Governor's office?

A. I was told that there was an American consulate office in Yokahama but in the very near future there will be an American consulate established in Kobe so it will be more convenient for you so you had better wait until then.

Q. Did he wait until the American consulate was opened in Kobe?

A. I want to go to Yokahama but I couldn't make it so I waited until the American consulate in Kobe was established.

Q. In 1947, in April, were elections held in Japan? A. Yes. [29]

Q. Did you hear about the election, among other things, through the newspapers, radio and political speeches? A. Yes, it is so.

Q. What was said about participation of the people in the elections?

A. Well, we were told that we should cooperate with Japan Government and everybody should go for the election.

Q. Did you consider that as a request directed to you to vote? A. I thought it was requested.

Q. Will you explain the election participated in by the heads of houses or families in the neighborhood for a leader?

The Interpreter: I beg your pardon?

(Testimony of George Takehara.)

Q. (Continuing): Would you explain the elections held in a block or neighborhood for the election of a block leader or captain?

A. Block leader or head of the block.

Q. And who participates in such elections?

A. Well, there is a block leader or head of the block and those people are participating in the community services.

Q. Who elects them? [30]

A. The master of the household of each family.

Q. And what are the duties and authority of the block leader?

A. He will get the order from the village officer and he is more or less a liaison person to us.

Q. Did he transmit the orders and wishes of the village officer to the individuals in that block or neighborhood? A. Yes.

Q. What elections, if you know, were held in Japan in April of 1947?

A. For the congressman, for the governor, for the mayor, village master, education committee.

Q. What is that, one election held on one day or was it one election held in a series?

A. There was—the election was separated in four days and there were two elections for each day.

Q. Were they elections divided as to officials to be elected?

A. Each election was separated as a congressman, governor, mayor, village master, village committee, and so forth.

(Testimony of George Takehara.)

Q. Were you contacted by the block leader to vote?

A. The block leader visit every family and asked them to go to the poll. [31]

Q. Did the block leader visit you?

A. He didn't talk to me directly.

Q. To whom did he talk?

A. He was talking to my grandfather to go to the election.

Q. And thereby to get the grandfather to get the rest of the family to go to the poll?

A. Yes.

Q. And did the block leader talk to his grandfather in his presence? A. Yes, I was there.

Q. You were there. Did you have a conversation with your grandfather about going to the polls to vote?

A. At the date of the election my grandfather was talking to me.

Q. And what did he say to you?

A. My grandfather went to election before I did. When he returned he told me that there was a Japanese police and also some military police at the poll and they were walking back and forth and when the grandfather told me that if you don't go to poll maybe you may get into trouble such as they might cancel your food ration card or you might be involved in some other trouble and all the neighbors are talking about it, so you had better hurry up and [32] go.

(Testimony of George Takehara.)

Q. Were the military police—withdraw that. What was the nationality of the military police?

A. The army of the United States.

Q. Were there Japanese police there also?

A. Yes, they were together with the military police.

Q. Did you also have a conversation with your uncle, Seiji Fujihara? A. Yes, I have.

Q. Did he request that you go to the polls?

A. Yes, he did at the day of the election.

Q. And what did he tell you?

A. The uncle told me that, "If you don't go to the election at this time you might get involved in a very deep trouble. I am going now so you might as well come along with me."

Q. Did he say anything else?

A. The uncle told me whatever my grandfather told me, conveyed the same message to me.

Q. Did you then go to the polls?

A. Yes, I went with my uncle.

Q. And did you see American military police at the polls? A. Yes, I saw some.

Q. Were they armed? [33]

A. I believe they had a stick and revolver.

Q. And were the Japanese police armed?

A. The Japanese police carries the pistol at all time.

Q. Did they at that time?

A. The police didn't have any arms at that time.

Q. The Japanese police didn't? A. Yes.

Q. Did other people urge you to vote besides the

(Testimony of George Takehara.)

block captain, your grandfather and your uncle?

A. The school children were coming around many times urging everybody to vote.

Q. Did you know at the time that you participated in the April elections that you might be jeopardizing your status as an American citizen?

A. I didn't know absolutely.

Q. I am going to ask it again. I understand the meaning, but it might look different in the print. Did you know that you might be jeopardizing your American citizenship by voting in the elections in April? A. I didn't know.

Q. You didn't know. Did you ever vote after the April elections? I mean April elections of 1947, to clarify it for the record.

A. No, I have not. [34]

Q. Did he vote prior to the April elections of 1947? A. No, I have not.

Q. Did you go to the American consulate at Kobe, Japan? A. Yes, I have.

Q. And did you make application to return to the United States?

A. I went there to get the form, application form.

Q. Did you make application?

A. At that time they told me that once I voted they wouldn't give out any forms so I couldn't make any application at that time.

Q. When was the first time you found out that voting in the elections in Japan would jeopardize your American citizenship?

(Testimony of George Takehara.)

A. It was after about six months of election when I went to American consulate I found out.

Q. Did you answer certain questions put to you by the American consul or his representative or an interpreter for the American consul?

A. Yes, I have.

Q. Did you receive from the Vice Consul of the United States at Kobe a copy of a certificate stating that you lost your nationality because of voting in the Japanese political election of April 5, 1947? [35]

A. I received a notice around June of this year.

Mr. Shucklin: Plaintiff's Exhibit 1.

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Plaintiff's Exhibit 1 marked for identification.)

Q. Handing you plaintiff's Exhibit 1 for identification, I ask you to look at the two papers and state whether or not you received them from the United States consulate?

A. Is this the paper for losing the citizenship?

Mr. Shucklin: That is in English, your Honor, and I ask permission to advise him that it is.

The Court: Yes.

Q. Yes.

A. Yes, the paper is sent by the mail to me.

Mr. Shucklin: I offer Plaintiff's Exhibit 1 in evidence after Mr. Dovell has a chance to look at it, your Honor.

Mr. Dovell: No objection.

(Testimony of George Takehara.)

Mr. Shucklin: I offer it.

The Court: Plaintiff's Exhibit 1 admitted.

The Clerk: Plaintiff's Exhibit 1 admitted in evidence.

PLAINTIFF'S EXHIBIT No. 1

[Plaintiff's Exhibit No. 1 is identical to Exhibit A attached to the amended Complaint. See page 7 of this printed record.]

Admitted in evidence December 20, 1951.

Mr. Shucklin: You may examine. [36]

Cross-Examination

By Mr. Dovell:

Q. George, do you remember your first trip to Japan?

A. I don't remember anything when I went there when I was four years old, but I remember the second time I went when I was nine years old.

Q. Do you remember when you went to Japan that you could talk English?

A. Yes, I could talk a little bit.

Q. Had he been to school in America?

A. Yes, I went to school.

Q. How many years?

A. About three years I believe.

Q. And on his second trip to Japan who went with him?

(Testimony of George Takehara.)

A. My brother Shoichi and Yorksusa Sakahara.

Q. Who?

A. My brother Shoichi and Yorksusa Sakahara.

Q. Any relation to him?

A. He was a person was living in the same village and was working together.

Q. After he grew up in Japan did he take, participate in the Japanese customs in the way of sports and going to school? A. Yes.

Q. He entered into the social life of the Japanese [37] people? A. Yes.

Q. Did he ever intend to acquire Japanese citizenship? A. Not for myself.

Q. Did he——

The Court: That question was hardly accurate. The question wasn't whether he wanted to acquire Japanese citizenship, the question was whether he wanted to accept Japanese citizenship because as I understand the international features of it, the claims were made by the Empire of Japan, or the Emperor of Japan that a Japanese born of Japanese nationals in the United States still acquired Japanese citizenship and the duty and obligations of royalty to the Emperor. So the question is whether he intended to accept Japanese citizenship and assume its responsibilities.

Q. (Continuing): Did you know that while you were in Japan, did you come to know that the Japanese Government did not recognize foreign citizenship of its own nationals?

Mr. Sakahara: I think the interpreter is having difficulty with that question.

(Testimony of George Takehara.)

The Interpreter: Would you repeat that [38] question, please.

Q. (Continuing): Did you know that the Japanese Government did not accept foreign citizenship for their nationals? In other words, any national of Japan was still a citizen of Japan to the Japanese Government.

The Interpreter: Any national?

Q. (Continuing): Of Japan, no matter where born as long as of Japanese blood.

The Interpreter: Yes, I understand.

A. Unless you are registered they treated you as a foreigner.

Q. Did he do anything to refuse to accept Japanese citizenship? A. No, I have not.

Q. Did anybody make any threats that they would do him bodily harm if he didn't vote in the elections? A. No.

Mr. Dovell: That is all.

Redirect Examination

By Mr. Shucklin:

Q. What language was spoken in your family until you went to school here in the United States when you were a young boy? [39]

A. Japanese. When I was talking to brother I was using English.

Q. How about his father and mother?

A. I was using Japanese,

Q. Why is it that you didn't register your birth

(Testimony of George Takehara.)

with the Japanese authorities yourself personally?

A. Well, since I thought I would be returning to the United States, I thought there was no use to register in Japan.

Q. Then you yourself did not register your name with the Japanese authorities but a relative did?

A. Yes.

Mr. Shucklin: You may examine, that is all.

Mr. Dovell: That is all.

The Court: How many more witnesses have you, counsel?

Mr. Shucklin: That is all, your Honor. We rest now.

The Court: You have nothing but documents?

Mr. Dovell: Just the documents, your Honor, of the Department, State Department. This record is certified by the Acting Secretary of State and signed by him and James E. Webb and by M. P. Chauvin, Authentication Officer in the Department of State. It contains application for passport February 27, 1950. It also [40] contains photostatic copies of Foreign Service Despatch re approval of certificate of identity for George Takehara and the affidavit to explain the protracted absence on Form 213, and in that connection it has the opinion of the Vice Consul taking the affidavit and five attachments which consist of affidavit of identity, supplement to 213, questionnaire and the questionnaire also has the English translation, certified statement from Japanese Government re voting and certificate of loss of nationality of the United States.

Mr. Shucklin: No objection.

The Court: Admitted.

Mr. Dovell: Please mark.

The Clerk: Defendant's Exhibits A-1 and A-2 are marked for identification and admitted in evidence.

(Defendant's Exhibits A-1 and A-2 marked for identification and admitted.)

DEFENDANT'S EXHIBIT A-1

United States of America

No. 4830

Department of State

To all to whom these presents shall come, Greeting:

I Certify That the documents hereunto annexed are true copies from the files of this Department.

In testimony whereof, I, James E. Webb, Acting Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this seventeenth day of September, 1951.

[Seal] /s/ JAMES E. WEBB,
Acting Secretary of State.

By /s/ M. P. CHAUVIN,
Authentication Officer,
Department of State.

Defendant's Exhibit A-1—(Continued)

(Classification): Unclassified.

Foreign Service Despatch
For Dept. Use Only

Desp. No. 354.
Date June 26, 1951.
Priority: Air Pouch.
From: Kobe Branch, Uspolad, Kobe, Japan.
To: The Department of State, Washington.
Ref: .....

Subject: Approval of Certificate of Identity for George Takehara.

Recd. Action Info.: 130-Takehara, George.

The passport application executed here by George Takehara on February 27, 1950, was disapproved by the Department on February 23, 1951. George Takehara applied at this office on June 21, 1951, for a Certificate of Identity under the provisions of Section 503 of the Nationality Act of 1940. A copy of his court complaint reads in part as follows:

> "That the Vice Consul of the United States of America at Kobe, Japan, has refused to recognize the American citizenship claimed by plaintiff herein on the ground that the said plaintiff has expatriated himself under the provisions of Section 401 (e) of Chapter IV of the Nationality Act of 1940, 8 U.S.C. 801, by 'voting in the Japanese political election of April 5, 1947.'

Defendant's Exhibit A-1—(Continued)

"That plaintiff, George Takehara, admits that he did vote at the election in Japan as alleged by the American Vice Consul as set forth in paragraph VI but notwithstanding said section 401 (e) of Chapter IV of the Nationality Act of 1940 (8 U.S.C. 801) claims that he did not thereby become expatriated for the reason that at the time of the said voting in a technical sense Japan was not an independent country, but was then and now under the jurisdiction of the United States and at the time of said election subject to the direct command of General Douglas MacArthur of the United States Army, Supreme Commander for Allied Powers with full jurisdiction over Japan, and in addition the voting at the said election was done pursuant to order of the said MacArthur acting in such capacity."

It is believed that his court complaint is made in good faith and has substantial basis.

Investigation by the Japanese Government concerning the conditions under which he voted revealed no evidence of coercion or duress in connection with his acts of voting. It was also ascertained that he had not submitted a claim to exemption from voting. The applicant's full statement regarding his voting and the Japanese Government's findings were sent to the Department with his application for a passport on August 18, 1950.

Investigation by appropriate military authorities

Defendant's Exhibit A-1—(Continued)

revealed that he voted as stated and that pertinent agencies and interviews of sources having knowledge of his wartime activities failed to reveal any information which might further reflect upon his citizenship status.

Action Copy—Department of State.

The action office must return this permanent record copy to DC/R files with an endorsement of action taken.

[Stamped]: June 27, 1951.

[In Margin]: /s/ W. E. Duggan.

Pd.

67

130

Form No. 176
(Revised March 1939)

Original

Budget Bureau No. 67-R013.1.

REGISTRATION APPROVED
Date .....
Expires .....
..... Consul .....
Place .....

Application for Passport
Application for Registration
(Indicate plainly which is desired)
[FORM FOR NATIVE CITIZEN]

PASSPORT ISSUED
Date .....
No. .....
Expires .....
..... Consul .....
Place .....

I, George Tarakawa, (Name in full), a NATIVE citizen of the United States, solemnly swear that
I was born at Fresno, (City or town) Washington, (State or country)
on June 15, 1926; that I am now residing at Hoo-h, Tarrow-ura, Yamaguchi-ken, Japan (Date) (Give present address in full)
that I resided continuously in the United States from 1926 to 1935, at Washington, (City and State)
and that I have resided outside the United States as follows:
(State name of, and period of residence in, each foreign country)
Japan, from 1935 to present
....., from ..... to .....
(Name of countries)
My **legal residence** is at Rt. 1, Box 454, Tacoma, Washington
and I intend to return to the United States to reside permanently, within as soon as my status is cleared {months. years.
*I was {never married / last married on July 2, 1935} to Hiroko Tarada
who was born at Tokyo-shi, Yamashiro-ku, Shi 2, 1916; who {is / is not} an American citizen,
and who is now residing at Tarrow-ura, Yamaguchi-ken, Japan
My **father**, Kichi Tarada, was born at Tarrow-ura, Yamaguchi-ken, Japan (Name in full) (City or town) (State or country)
on Dec. 2, 1905 and is now residing at Rt. 1, Box 454, Tacoma, Washington
My **mother**, Ito Yoshida, was born at Tarrow-ura, Yamaguchi-ken, Japan (Maiden name) (City or town) (State or country)
on Dec. 2, 1905 and is now residing at Rt. 1, Box 454, Tacoma, Washington

(IF EITHER PARENT WAS BORN OUTSIDE THE UNITED STATES, FILL IN THIS PORTION)

My father emigrated to the United States on or about 1905, 1....; resided continuously
in the United States from 1..... to 1....., at Washington, and was naturalized as a
citizen of the United States before the ..... (Name of court) Court of .....
at ..... (City and State) on ..... (Month) ..... (Day) 1..... (Year)

My mother emigrated to the United States on or about 1917, 1....., resided continuously
in the United States from 1..... to 1....., at Washington, and was naturalized as a
citizen of the United States before the ..... (Name of court) Court of .....
at ..... (City and State) on ..... (Month) ..... (Day) 1..... (Year)

I request the inclusion of my wife ..... (Name in full);
She acquired citizenship through .....

I request the inclusion of my minor children as follows:

..... (Name in full), born at ..... (Place and State or country) on ..... (Date), 1.....
....., born at ..... on ....., 1.....
....., born at ..... on ....., 1.....

I {have / have not} been naturalized as a citizen of a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered, or served in, the armed forces of a foreign state; accepted, or performed the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof; voted in a political election in a foreign state or participated in an election or plebiscite to determine the sovereignty over foreign territory; made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state; been convicted by court martial of deserting the military or naval service of the United States in time of war, or of committing any act of treason against or of attempting by force to overthrow, or of bearing arms against the United States.

If any of the above mentioned acts or conditions are applicable to the applicant's case, a supplementary statement under oath should be attached and made a part hereof.

*A woman applicant who has been married more than once should give name and place of birth of each husband, date of each marriage, and date of termination of previous marriage(s) through death or divorce. This and any other information necessary to clarify the citizenship status of the applicant should be set forth in a separate affidavit which will be considered a part of this application.

16—23144-2

Tarada, George (Surname) (First name) (Middle name)
(When name IN FULL when application is made)

OATH OF ALLEGIANCE

...George Takehara
(Signature to be affixed by applicant)

...50 ...7th ...day of February ...John W. Burnett
...John W. Burnett ...of the United States at Kobe, Japan

925

DESCRIPTION OF APPLICANT

Height: 5 feet 4 inches. Hair Black Eyes Brown
Distinguishing marks or features None
Place of birth Firwood, Washington
Date of birth March 13, 1926
Occupation None

EVIDENCE OF CITIZENSHIP AND IDENTIFYING DOCUMENTS

Passport No. 635093 issued on Sept.14,1928
by Dept. of State
{ to applicant, to x x x } SUBMITTED.
(State name and relationship)
State disposition of passport Taken up and cancelled at this office.
Other evidence of citizenship and identifying documents submitted, as specified below: (Indicate whether sent to the Department, retained in files of office, or returned to applicant.) Cert. of Birth dated Oct.29,1939 presented and returned.
Aff. of Identity executed in the US sent to Dept. Cert. of Identity issued by local police filed here.

The following should be filled in if this application is for a PASSPORT:

Countries to be visited: ... Purpose of visit: ...
Port of departure: ... Date of departure: ...
Name of ship: For return to US Is the ship of an American line? ... ("Yes" or "No")

REFERENCES

... (Name) ... (Address)
... (Name) ... (Address)

AFFIDAVIT OF IDENTIFYING WITNESS

I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below my signature hereto affixed; that I know the applicant who executed the affidavit hereinbefore set forth to be the person he represents himself to be, and that he is a citizen of the United States; that the statements made in the applicant's affidavit are true to the best of my knowledge and belief; further, I solemnly swear that I have known the applicant personally for ... years.

(Signature of witness) ...
(Residence address of witness) ...

[SEAL]

SUBSCRIBED AND SWORN to before me this ... day of ..., 1...

If an American citizen is available, on this known to the consular may execute the affidavit.

Consul ... of the United States of America at ...

The applicant requests that the following person be notified in the event of his death or disability:
Mr. Tutaro Takehara, at. 12 box 454, Tacoma, Washington (father,
(Name) (Address)

Additional data: Location of real and personal property, nature and place of investments, location of will, et cetera. (It is entirely optional with the applicant to give this information.)

Registration {approved / disapproved} by the Department of State on ... (Date)
Certificate of Identity and Registration } issued to the applicant on ...
Certificate of Identity and Registration } (Initials of examiner and date)

REMARKS

Defendant's Exhibit A-1—(Continued)

Supplement to Form 213 or 213a

(This Form Must Be Filled Out Completely and Presented at the Time of Appointment.)

1. Last name: Takehara; First name: George; Middle name: None.

2. Honseki: 1103-1 Tannowa-mura, Sennan-gun, Osaka-fu.

3. Height: 5′ 4″; Weight: 125 lbs.; Color of eyes: Brown; Color of hair, Black.

4. Date of birth: March 13, 1926; Place of birth, Firwood, Washington.

5. Date of last entry into Japan: Nov., 1935.

6. Places of residence since January, 1941, including present address. (Give complete addresses.)

1103-1 Tannowa-mura, Sennan-gun, Osaka-fu. Jan., 1941, to present.

7. Complete record of all activities since reaching the age of 18; this need not include activities in the United States. Give complete names and addresses, and inclusive dates, for all schools, places where employed, and other activities, whether full or part-time. In the case of employment, give also the name of your position. If this employment occurred during the war, give the name and address of your foreman or co-worker. If you were unemployed at any time, so indicate. Additional sheets may be used if necessary.

Full name and address of employer or school:

1103-1 Tannowa-mura, Sennan-gun, Osaka-fu. Mar., 1944, to present.

Position: Working on the farm.

8. I (~~have~~)(have never) been employed under a foreign government or political subdivision thereof; if so employed I give below the full and exact details of the position held, and I present evidence to show whether having the nationality of such country was a requirement for the position I held.
私ハ外国政府ニ又ハ政治的分課ニ勤務シタコトガ(~~有リマス~~)(有リマセン)
有ル場合ハ一私ガ下記ノ通リ私ガ執ッタ職務ニ就イテ詳細ヲ記述シ
且ツ私ハ其ノ國ノ國籍ヲ持ニヰマスガ其ハ上ノ職務ト何等ノ関係モ
ナイコトヲ証スル書類ヲ茲ニ提出致シマス。

x x x

9. I (do)(~~do not~~) possess Japanese nationality: the following are all the pertinent facts relating to my possession of Japanese nationality:
私ハ日本ノ國籍ヲ(持ッテ居リマス)(~~持ッテ居リマセン~~)。次ノ条目ニ國籍ニ
関スル事項ヲ詳細ニ記入スルコト。

I was born on March 13, 1926. I applied for my Japanese nationality on Jan. 12, 1943 and the permission was granted on March 16, 1943. I was then 16 years of 10 motnhs old.

10. I (~~have~~)(have never) served in the Japanese armed forces, as evidence of which I present the following documents.
私ハ茲ニ提出スル証據書類ノ通リ日本軍隊ニ服シタコトガ
(~~有リマス~~)(有リマセン)

I submit a certificate to that effect from Mr. Hiroshi Mizobata, Tannowa-mura village head.

11. I (have)(~~have never~~) voted in a political election in Japan.
私ハ日本ニ於テ政治上ノ選挙ニ投票シタコトガ(有リマス)(~~有リマセン~~)

I voted in 1946. I did not vote in 1947, 1948, 1949, and 1950. I submit a with certificate for 1946 from Mr. Miyamatsu Takeuchi, Tannowa-mura Election Mgtr. Committee official. I will submit a proper non-voting certificate since 1947 to present from local Election Control Committee official.

12. Give the names and addresses of five people in Japan, preferably employers or relatives, who know you well and can testify to your character and activities.

Full name	Full address
Mr. Yukichi Tanehara (grandfather)	[illegible]
Mr. Seiji Fuchihara (uncle,	[illegible]
Mrs. Fumiko Fuchihara (aunt,	[illegible]
Mrs. Yoshiye Matsumoto (aunt,	[illegible]
Mr. Tagaki Fuchihara (uncle,	[illegible]

Defendant's Exhibit A-1—(Continued)

Form 213 or 213a (cont'd).

13. Remarks. (Use this space for additional information relating to item 1-12, or for other pertinent information, including address or person through which applicant can always be reached.)

I solemnly swear that the foregoing answers are voluntarily made and are true, correct, and complete to the best of my knowledge and belief.

/s/ GEORGE TAKEHARA.
(Signature of Applicant.)

Subscribed and sworn to before me this 27th day of February, 1950.

[Seal] /s/ JOHN W. BURNETT,
American Vice Consul.

(Original)

Form No. 213
Foreign Service
(Corrected June, 1945)

Affidavit by Native American to Explain Protracted Foreign Residence

Affidavit by Naturalized American to Explain Protracted Foreign Residence

This form should be used by any native or naturalized American citizen who has resided abroad for two years or more.

The form must be used by a naturalized citizen

Defendant's Exhibit A-1—(Continued)

who has resided for two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated. It must also be used by a naturalized citizen who has resided continuously for five years in any other foreign state. In cases of naturalized citizens the exact periods and places of foreign residence since naturalization should be stated.

The form must always accompany applications for extension of passports which have been expressly limited in validity.

I, George Takehara, a native American citizen, born at Firwood, Washington, do solemnly swear that I ceased to reside in the United States on or about Oct., 1935; that I have since resided at Japan; and that I arrived in Japan, where I am now temporarily residing on Nov., 1935, my reasons for such foreign residence being as follows:[1] I was an infant when I accompanied my brother to Japan. I was a student here until Feb., 1944. Since graduation, I have been working on the farm. I now wish to be repatriated to my parents in the U. S.

I have (See Supp.) obtained naturalization in a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered or served in the armed forces

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[1]Executing officer will indicate whether the above is the affiant's independent statement. If not, officer should state extent to which he has prompted affiant and reasons therefor. Officer should also state whether or not affiant's statement has been translated from a foreign language.

Defendant's Exhibit A-1—(Continued)

of a foreign state; accepted or performed the duties of any office, post, or employment under the government of a foreign state or political subdivision thereof; voted in a political election in a foreign state or participated in an election or plebiscite to determine the sovereignty over foreign territory; made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state; been convicted by court martial of deserting the military or naval service of the United States in time of war; been convicted by court martial or a court of competent jurisdiction of the commission of any act of treason against; or of attempting by force to overthrow, or of bearing arms against, the United States.[2]

I maintain the following ties of family, business, and property with the United States: Parents, 2 brothers, and 1 sister in the U. S.

I do not pay the American Income Tax.

I intend to return to the United States permanently to reside within as soon as my status is cleared.

/s/ GEORGE TAKEHARA.
(Signature of Applicant.)

(Address): 1103-1 Tannowa-mura, Sennan-gun, Osaka-fu.

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[2]If any of these acts or conditions have been performed or fulfilled the affiant should set forth the facts fully in a supplementary statement which should be affixed to and made a part of this affidavit.

Defendant's Exhibit A-1—(Continued)

American Consular Service at Kobe, Japan.

Sworn to before me this 27th day of February, 1950.

[Seal] /s/ JOHN W. BURNETT,
Vice Consul of the United
States of America.

Instructions.—As many copies of this form should be made out as of the application for registration or for passport which it accompanies, and should be firmly attached thereto.

August 11, 1950.

The applicant speaks no English. The interview was conducted and the oath administered in Japanese. On the reverse is a summary of replies to questions asked in order to obtain the necessary information. The facts and circumstances regarding the applicant's foreign residence as stated are believed to be correct and to constitute the true reason for such residence.

Identity was established by photograph under seal on affidavit of identity executed in the United States and verified by certificate of identity issued by the local police. Citizenship claim was established by expired passport.

He reacquired Japanese nationality on application made on January 12, 1943, and permission granted on March 10, 1943. His claim to American citizenship was not affected thereby because he was then a minor.

Defendant's Exhibit A-1—(Continued)

He stated under oath on February 27, 1950, that he had voted in a Japanese political election of 1946. The attached certified statement from the Japanese Government gives the dates of his voting as April 5, 20, 25, and 30, 1947. It is believed that the Japanese Government statement is correct.

It is my opinion, based on interview, documents presented, investigation by appropriate military authorities, and certified statement from the Japanese Government, that he has lost all claim to United States citizenship by voting in the Japanese political election of April 5, 1947 (Section 401 (e), Nationality Act, 1940). A Certificate of the Loss of the Nationality of the United States accompanies this application.

/s/ D. J. MELOY,
American Vice Consul.

Attachments:

1. Affidavit of Identity.
2. Supplement to 213.
3. Questionnaire (2).
4. Certified statement from Japanese Government re voting (2).
5. Certificate of Loss of Nationality of U. S. (3).

DJM/tk

Opinion of Officer Taking Affidavit

The officer before whom the affidavit is made should see that the pertinent facts and circumstances regarding the applicant's residence abroad

Defendant's Exhibit A-1—(Continued)

are fully and correctly set forth in the affidavit and application. If, for any reason, they are not so stated, the officer should complete them in the space below, adding such comment or opinion as is appropriate. He should state whether the facts recited constitute the true reason for such residence. He should also state his opinion, in each case, whether the applicant has abandoned his allegiance and ties with the United States and so shaped his plans as to render it improbable that he will return to the United States to reside and perform the duties of a citizen and whether he has lost his American citizenship under any of the provisions of the Nationality Act of 1940. He should sign his name and add his title below the statement of his opinion.

Japanese Government
Ministry of Foreign Affairs
Liaison Bureau

To: General Headquarters, Supreme Commander for the Allied Powers.

From: Ministry of Foreign Affairs.

Subject: Information Concerning Voting History of George Takehara.

Fom No. 929 (LCR).

12 May, 1950.

1. Reference: Check Sheet of Diplomatic Section (Kobe Division), 1 March, 1950, subject: Request for Information from Japanese Government Concerning George Takehara.

Defendant's Exhibit A-1—(Continued)

2. The Ministry of Foreign Affairs has received a statement from the National Election Administration Commission on the subject matter to the following effect:

a. The dates, places and related laws of the elections in which he voted:

(1) Elections of Governor and Mayor.
Date: April 5, 1947.
Place: Zenshoji Temple, Tannowa-mura, Sennan-gun, Osaka-fu.
Related Laws: Law Concerning the Organization of Prefectures (Law No. 64, March 16, 1899).

Article 3-3. The inhabitants of the city, town and village in a prefecture shall be eligible to vote at the election of the prefecture in accordance with the provisions of the present law.

Article 6. The person who is eligible to vote at the election of the members of the assembly of a city, town or village shall be eligible to vote at the election of the members of the prefectural assembly.

Article 74-2. The person who is eligible to vote at the election of the members of the prefectural assembly shall be eligible to vote at the election for the governor.

Law Concerning the Organization of Towns and Villages (Law No. 69, April 7, 1911):

Defendant's Exhibit A-1—(Continued)

Article 7. Any inhabitant of a town or village who is a citizen of Japan shall, in pursuance of the present law, have the right of voting at its elections.

Article 12. Any citizen of a town or village who, being twenty years of age or upward, has been inhabitant of the town or village for six consecutive months at a given date shall have the right to vote at the election of assemblymen of the town or village. * * *

Article 61. * * * Any person who has the right to vote at the election for members of a town or village assembly shall have the right to vote at the election of the mayor * * *

(2) Election of Members of the House of Councillors.

Date: April 20, 1947.

Place: The same as quoted in (1) above.

Related Law: Law for the Election of Members of the House of Councillors (Law No. 11, February 24, 1947).

Article 3. Any person who has the right to vote at the election of Members of the House of Representatives shall have the same right at the election of Members of the House of Councillors.

Defendant's Exhibit A-1—(Continued)

(3) Election of Members of the House of Representatives.

Date: April 25, 1947.

Place: The same as quoted in (1) above.

Related Law: Law for the Election of Members of the House of Representatives (Law No. 47, May 5, 1925.)

Article 5. Any Japanese national who is over twenty years of age shall be eligible to vote.

(4) Election of Members of the Prefectural Assembly.

Date: April 30, 1947.

Place and related laws: The same as quoted in (1) above.

b. The elections in question are political elections.

c. There is no evidence of coercion or duress in connection with his acts of voting. It has been ascertained that he had not submitted a claim to exemption from voting.

For the Minister:

/s/ T. YOSHIOKA,
Chief of Liaison Section, Liaison Bureau, Ministry of Foreign Affairs.

The Japanese official(s), whose signature(s) appear(s) on the above documents, was, on the date of signing, qualified to sign such documents and

Defendant's Exhibit A-1—(Continued)

had the authority to do so in his official capacity, as shown.

[Seal] /s/ DAVID S. TAIT,
Lt. Col., GSC., Chief,
Japanese Liaison Section.

15 May a.m. 1950.

[Stamped]: American Consular Service, May 18, 1950, Kobe, Japan.

I, John W. Burnett, Vice Consul of the United States of America in and for Kobe, Japan, duly commissioned and qualified, do hereby certify that T. Yoshioka, whose signature is subscribed to the annexed instrument was on the 12th day of May, 1950, the day of the signing thereof, Chief of Liaison Section, Liaison Bureau, Ministry of Foreign Affairs, Japanese Government, to whose official acts faith and credit are due.

[Seal] /s/ JOHN W. BURNETT,
Vice Consul of the United States of America in and for Kobe, Japan.

Service No. 3636.

61

AFFIDAVIT OF IDENTITY

AMERICAN CONSULAR SERVICE
FEB 27 1950
KOBE JAPAN

UNITED STATES OF AMERICA)
STATE OF WASHINGTON)
COUNTY OF KING) ss
CITY OF SEATTLE)

I, FRANK MISAO OSAKA, being first duly sworn, depose and say:

That I am a citizen of the United States of America by reason of birth at Puyallup, Washington, on January 2, 1924.

That I reside at Route 2, Box 161, Tacoma, Washington.

That the photograph which is attached below under notarial seal is a photograph of GEORGE TAKEHARA, whom I have known personally for many years. The photograph bears an unmistakable likeness to him. That I was a neighbor and his playmate until his departure to Japan, in or about October, 1934. That since then, we have kept in close contact by exchange of letters and pictures.

That GEORGE TAKEHARA was born on March 13, 1926 in Firwood, Pierce County, Washington, and is a citizen of the United States. To the best of my knowledge and belief he has never performed any act which causes loss of American citizenship.

He is making application to the American Consul in Japan to establish his claim to the American citizenship, and I now make this affidavit for the purpose of establishing his identity.

Frank Misao Osaka

Subscribed and sworn to before me this 9th day of January, 1950.

Notary Public in and for the State of Washington, residing at Seattle.

tk

Original

FOREIGN CONTROL

DEPARTMENT OF STATE
Feb 23 1951
(Date)
CERTIFICATE APPROVED
For the
Secretary of State
R. B. Shipley
Chief, Passport Division
By

CERTIFICATE OF THE LOSS OF THE NATIONALITY OF THE UNITED STATES

(This form has been prescribed by the Secretary of State pursuant to Section 501 of the ... Act of October 14, 1940, 54 Stat. 1171)

Consular Consular Service of the United States of America at Kobe, Japan

I, D. J. Meloy, hereby certify that, to the best of my knowledge and belief,

George TAKEHARA was born at Firwood (Town or city), (Province or county),

Washington (State or country), on March 13, 1926 (Date);

That he resides at 1103-1, Tannoma-mura, Sennan-gun, Osaka-fu, Japan (Street) (City) (State);

That he last resided in the United States at Route 12, Box 697, Tacoma (Street) (City)

Washington (State);

That he left the United States on October 28, 1935 (Precise date should be given);

That he acquired the nationality of the United States by virtue of birth in the United States (If a national by birth in the United States, so state; if naturalized, give the name and place of the court in the United States before which naturalization was granted and the date of such naturalization)

That he has expatriated himself under the provisions of Section 401 (e) of Chapter IV of the Nationality Act of 1940 by voting in the Japanese political election of April 5, 1947 (The action causing expatriation should be set forth succinctly)

That the evidence of such action consists of the following: His sworn statements on Supplement to 213 and Questionnaire both dated February 27, 1950; certified statement from the Japanese Government regarding his voting record (Here list the sources of information and such documentary evidence as may be available concerning the action causing expatriation of the individual concerned)

In testimony whereof, I have hereunto subscribed my name and affixed my office seal this 11th day of August (Month), 19 50

[SEAL]

D. J. Meloy
(Signature)

D. J. Meloy
Vice Consul of the United States of America
(Title of officer)

(OVER)

130-TAKEHARA, GEORGE

ISM

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NO FEE

635093

The Department of State will act upon this application as promptly as possible after its receipt. Inquiry concerning it should be made only in case of emergency, since the time consumed in responding to such an inquiry may retard the issue of a passport to you and would necessarily retard the issue of passports to other persons.
An application for a passport must have attached to it a copy of the applicant's photograph.
A loose signed photograph of the applicant must accompany the application.
The photographs must be on thin paper, should have a light background, and be not over three inches in size.

The legal fee for a passport is nine dollars, in currency or postal money order, and one dollar for execution of application.
The total fee is $10.00. It is unnecessary to pay any other fee to any person in connection with the filing out or execution of this application or for obtaining the passport. All necessary information and guidance will be given applicant by the clerk of court or Passport Agent before whom this application must be executed.

[EDITION OF 1927]

[FORM FOR NATIVE CITIZEN]

PASSPORT
ISSUED
SEP 18 1928
DEPARTMENT OF STATE

UNITED STATES OF AMERICA

STATE OF Washington
COUNTY OF Pierce
} as

I, George Takahara (Name in full), a NATIVE CITIZEN OF THE UNITED STATES, hereby apply to the Department of State, at Washington, for a passport. I solemnly swear that I was born at [illegible] (See footnote) (City or town) Washington (State), on Mar. 24, 1906 (Date); that I was married on ..... (A woman must insert date of last marriage or state never been married)

that my {father / husband}, Yutaro Takehara (A woman who has been married must refer to husband), was born at Osaka-fu, Japan (City or town) (State or country)

and is now residing at R. F. D. 1 Box 455 A, Puyallup, Washington (Give present address. If deceased, give date of death)

The portion in this block need not be filled in by a married woman or a person whose father was born in the United States

My father emigrated to the United States on or about Sept. 1907, resided continuously in the United States from 1907 to 1908, at Seattle, Washington, and was naturalized as a citizen of the United States before the ..... (Name of court), Court of ..... (District, State, County), at ..... (City and State), on ..... (Month) ..... (Day) ....., 1..... (Year)

I have resided outside of the United States at the following places for the following periods:
[Name each country visited and length of stay in each]

..... from ..... (Departure from U. S.) to .....
(Names of countries visited)
..... from ..... to ..... (Return to U. S.)

and that I am domiciled in the United States, my **permanent residence** being at ..... (Street address)
in the city of Puyallup, State of Washington

My last passport was obtained from ..... (Washington or location of office abroad), on ..... (Date)
and was ..... (Disposition of passport). I am about to go abroad temporarily and intend to return to the United States within One {months / years} with the purpose of residing and performing the duties of citizenship therein.

I desire a passport for use in visiting the countries hereinafter named for the following purpose:

Japan
(Name each country to be visited) (Objects of visits)

I request that my passport include my wife ..... (Name in full), who was born at ..... (Place and state or country) on ..... (Date) and to whom I was married on ..... (Date of marriage) [My wife was naturalized as a citizen of the United States before the (Portion in brackets not to be filled in if wife claims citizenship through birth in the United States)
..... Court of ..... at .....
(Name of Court) (District, State, county) (City and State)
on ..... (Month) ..... (Day) ..... (Year), as shown by the accompanying Certificate of Naturalization. Since naturalization she has resided abroad at the following places for the following periods.

..... from ..... (Departure from U. S.) to .....
(Names of countries visited)
..... from ..... to ..... (Return to U. S.)

I request that my passport include my minor children as follows:

FEE RECEIVED SEP 17 1928

..... born at ..... on .....
..... born at ..... on .....
..... born at ..... on .....
(Name) (Place and state or country) (Date)

29956

A person born in the United States should submit a birth or baptismal certificate with his application, or if the birth was not recorded, affidavits from the attending physician, parents, or other person having sufficient knowledge to be able to testify as to the date and place of the applicant's birth. The same kind of evidence should be submitted if American-born wife is included in the application and the marriage occurred on or after September 22, 1922. If wife acquired American citizenship through naturalization on or after date last mentioned evidence of her citizenship of the nature set forth in the Rules Governing the Granting and Issuing of Passports in the United States should be submitted.

1—11728

(OVER)

BIRTH CERTIFICATE SEEN

(Surname) Takahara, George
(To be printed by applicant for passport) (Given name) (Middle initial)

OATH OF ALLEGIANCE

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion: So help me God.

George Takehara
(Signature of applicant)

Sworn to before me this 11th day of Sept. 1928

Father Yutaro Takehara

[SEAL OF COURT]

Eugene E. Rowley
Clerk of the Agt Court of the State.

DESCRIPTION OF APPLICANT

Height: ..... feet, ... inches. Age: ..... years.

Hair: ..... Eyes: .....

Distinguishing marks or features .....
(Note any facial marks or scars by which applicant may be identified)

Place of birth ..... Date of birth Mar. 1, 1906
(City and State) (Month, day, and year)

Occupation .....

I intend to leave the United States from the port of Seattle, Washington
(Port of departure)

sailing on board the President Pierce on Sept. 14 1928, 192
(Name of ship) (Date of departure)

ADDRESS

I request that my passport be mailed to the following address:

Name: George Takehara

No. and Street: R. F. D. 1 Box 495 A,

City and State: Puyallup, Washington

[NOTE.—A passport will not be mailed to an applicant's place of employment (not home).]

AFFIDAVIT OF IDENTIFYING WITNESS

I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below my signature hereto affixed; that I know the applicant who executed the affidavit herein before set forth to be a citizen of the United States; that the statements made in the applicant's affidavit are true to the best of my knowledge and belief; further, I solemnly swear that I have known the applicant personally for Life years.

No lawyer or other person will be accepted as witness to a passport application if he has received or expects to receive a fee for his services in connection with the execution of the application or obtaining the passport.

Ayako Nakata
(Name of witness)

R. F. D. 5 Box 475 Seattle
(Residence address of witness)

Sworn to before me this 12 day of Sept. 1928

Eugene E. Rowley
Clerk of the ..... Court of the State,

at Seattle, Wash.

[SEAL OF COURT]

George Takehara

A ..... must be sent to the Department with the application, to be affixed to the passport with an impression of the Department's seal.

Admitted in evidence December 20, 1931.

DEFENDANT'S EXHIBIT A-2

Questionnaire

This form should be executed in triplicate by any person who claims that he is or was a native or naturalized national of the United States from whom any officer of the Foreign Service desires to obtain information additional to that contained in an application for a passport or in any other form used in connection with the determination of the nationality status of such person.

1. During your foreign residence, have you prior to this visit appeared at an American consular office for the purpose of applying for a passport or to be registered as a national of the United States, or for any other purpose?

(Yes or no): Yes.

If so, give date of each appearance, place of such office and purpose of appearance.

About September, 1949, American Consular Service at Kobe, to request appointment for passport application.

2. If you were accompanied by anyone during any such appearance, give name, relationship, and address of each such person and place and date of appearance.

None.

3. Are you known or considered in your community to be a national of Japan?

(Yes or no): Yes.

4. Have you ever been registered as a national of Japan or any other foreign country, or obtained

Defendant's Exhibit A-2—(Continued)

a passport, certificate, card or other document therefrom in which you were described as a national of a country other than the United States?

(Yes or no): Yes.

If so, give date and place of registration and/or date and place of issue and description of any such document and a statement of circumstances under which you were registered or obtained any such document.

I applied for my Japanese nationality on Jan. 12, 1943, and the permission was granted on Mar. 10, 1943. I established my own Family Register on May 25, 1943.

5. Have you ever informed any local or national official of Japan or any other foreign state that you are a national of the United States?

(Yes or no): Yes.

If so, give name and address of such official and date when he was so informed.

Prior to my reacquisition of Japanese nationality, I informed to an official of the Ozaki Police Station. (Name and address unknown.)

6. Have you ever been a member of any Japanese or other foreign political party, organization, association, faction or group?

(Yes or no): No.

If so, give details of joining each, address of headquarters, period of membership and purpose of becoming a member.

.....

Defendant's Exhibit A-2—(Continued)

A. Military Service

1. Have you ever entered or served in the armed forces of Japan or any other foreign state?

(Yes or no): No.

* * *

B. Employment by a Foreign Government

1. Have you ever accepted or performed the duties of any office, post or employment under the government of Japan or any other foreign state or political subdivision thereof?

(Yes or no): No.

If so, give place and period of employment, title of position held by you, and name of your superior officer.

. . . . . .

* * *

C. Voting in a Foreign Country

1. Have you ever voted in a political election in Japan or any other foreign state or participated in an election or plebiscite to determine sovereignty over foreign territory?

(Yes or no): Yes.

If so, give date and place of voting and nature of each such election or plebiscite.

April 10, 1946, Zenshoji Temple, Tannowa-mura, Sennan-gun, Osaka-fu, to elect Member of the House of Representatives.

2. Prior to voting, did you make a claim to

Defendant's Exhibit A-2—(Continued)

citizenship of the United States to any local or national official?

(Yes or no): No.

3. Did you request exemption from voting? (Yes or no): No.

If so, give name and address of each official to whom you made request to be exempted.

.....

4. Were you urged, advised, or coerced to vote by any official or other person?

(Yes or no): No.

If so, state name and address of each such official or person and give detailed statement of the circumstances surrounding such urging, advising, or coercing. .....

* * *

6. In connection with voting, did you ever consult an American foreign service officer concerning an effort to influence you to vote?

(Yes or no): No.

If so, give date, name and address of such officer.

.....

7. Give detailed statement of your reason for voting.

Overhearing rumors that non-participants were to be punished caused me to vote and I did not know that one loses his American citizenship by voting.

I solemnly swear that the foregoing answers,

Defendant's Exhibit A-2—(Continued)

statements and explanations are true to the best of my knowledge and belief.

/s/ GEORGE TAKEHARA.
(Signature of Applicant.)

Subscribed and sworn to before me this 27th day of Feb., 1950.

/s/ JOHN W. BURNETT,
Vice Consul of the United States of America at Kobe, Japan.

Japan,
City of Kobe,
American Consular Service—ss.

Before me, John W. Burnett, Vice Consul of the United States of America in and for Kobe, Japan, duly commissioned and qualified, personally appeared Hideo Konishi, known to me to be familiar with the English and Japanese languages, who, being duly sworn, deposes and says that the annexed translation is a true translation into English of the attached completed questionnaire in Japanese, and further deponent saith not.

/s/ HIDEO KONISHI.

Subscribed and sworn to before me this 27th day of February, 1950.

[Seal] /s/ JOHN W. BURNETT,
Vice Consul of the United States of America.

Service No. 927.

Admitted in evidence December 20, 1951.

Mr. Dovell: There are some questions and answers, your Honor, in this exhibit and counsel would like to have them read. I haven't any objection. I will proceed to read them if the [41] Court so directs.

The Court: What do you want them read for?

Mr. Shucklin: I think unless—I mean either your Honor will read them at your leisure or we will read them orally if you——

The Court: No, I don't to waste any time reading them. I can read.

Mr. Shucklin: Okay.

The Court: Have you anything more, counsel?

Mr. Dovell: No, your Honor, that is our case.

The Court: Any rebuttal?

Mr. Shucklin: No rebuttal, your Honor.

The Court: I think that this is an important question and I think it should be briefed. Counsel for the plaintiff has a brief.

Mr. Dovell: I will submit one, your Honor, if you so request.

The Court: Yes, all right. I not only request, I direct.

Mr. Dovell: Pardon me, I mean direct. How much time——

The Court: How much time do you want?

Mr. Dovell: Well, I would like to have—I am working on other briefs, but maybe I can get——

The Court: That's all right, I don't want to crowd you. [42]

Mr. Dovell: I'd like to have two weeks.

The Court: Yes, all right. I think I will give

you more time than that because I won't be back here until sometime——

Mr. Dovell: I will appreciate all the time you can give me.

The Court: ——sometime in January so I will be here on the 8th of January. I will give you until, let's see, that will be, well, I will give you to the 8th of January to file your brief and at that time I will fix more time for you, Mr. Shucklin, if you wish to reply to it.

Mr. Shucklin: Yes, your Honor.

The Court: And then I will take up the question of oral argument. I want to say to you that I notice in your brief, at least I didn't notice in your brief, that you had cited some of the pertinent authorities to my mind, and that is some of my own opinions and rulings of the Supreme Court in regard to them. For instance, the series of cases connected with Minoru, United States vs. Minoru Yasui, my opinion in the Federal Supplement, the review of that question by the Court of Appeals of the Ninth [43] Circuit and by the Supreme Court of the United States. You will find that in connection with the March cases, and then with my final opinion in the Federal Supplement where I reduce the sentence owing to the ruling of the Supreme Court. I think that probably the holdings in that case are not of great interest, but there is great interest in the discussions, particular discussions of the Japanese citizenship in those cases and the question of dual citizenship which is discussed. Likewise, in the case in re Marjorie Reid which I decided in the District Court of the District of Oregon and discussed the

question of the citizenship of a minor and the taking away of the citizenship by virtue of statutes where the person married and thereby, by virtue of the statute, lost citizenship. There are two other discussions which I have dealt with on the subject in a general way and I don't have those citations in mind, but there was an opinion that I rendered in the District of Columbia which related to the question of habeas corpus as to one of the war criminals, or two of the war criminals who were tried [44] by military commission in the Philippines and I was asked as sitting in the District Court of the District of Columbia, to grant habeas corpus. At that time I discussed a question of military occupation and the powers of an allied commander as an officer of the United States, but I did, in those two cases also, touch on the question of the powers of the occupation government. I note you have the Ninth Circuit Court of Appeals' opinion cited in that regarding occupation, so maybe that question is foreclosed, but those two cases are entitled in re Yamamoto vs. Royall and Watanabe vs. Royall. In as far as you find those pertinent, I should be pleased to have a discussion of the principles involved.

Mr. Dovell: Thank you, your Honor.

The Court: The Court is in recess until two o'clock.

(Whereupon, Court was recessed at 12:20 p.m.) [45]

TRANSCRIPT OF ORAL ARGUMENT

between counsel in the matter of George Takehara vs. Dean G. Acheson, Secretary of State, No. 1482, before the Honorable James Alger Fee, United States District Judge, at Tacoma, Washington, on the 24th day of January, 1952, at 10:25 a.m.

The Clerk: Cause No. 1482, George Takehara vs. Dean Acheson, Secretary of State, for hearing of oral argument, Toru Sakahara and Gerald Shucklin.

Mr. Shucklin: Ready, your Honor.

The Clerk: And Mr. Dovell for the Defendant. Counsel ready for argument?

Mr. Shucklin: Yes. May it please the Court, this case involves the citizenship of George Takehara of Japanese ancestry who was born right in this county on March 13, 1926, and, of course, is a citizen of the United States by virtue of the Fourteenth Amendment to the United States Constitution, and, as was brought out in the evidence, his family consists of his father, his mother, a brother, age 20, who is in the United States Army, a sister, age 13, attending school, and another brother, age 7, who also attends school, and the family resides at Fife on a farm just outside of Tacoma. [46] And another brother was a member of the family, but while a member of the United States Armed Forces, was killed in action in Europe. So we have a situation where the plaintiff's whole family, his brothers and sister, his mother and father, reside here. Like he, his brothers and sister are American citizens. The evidence shows that in 1935 when the plaintiff was

nine years old he and the brother who was killed in action were sent to Japan to be with their grandparents. In 1939 the brother returned to Tacoma. The father intended to bring the plaintiff back in a couple of years, but war intervened at this time and that desire could not be accomplished. George's schooling consisted of six years of primary school and three years in the middle school. During the war he went to an electrical school, but never became an electrician, and he continued to be a farmer. George was raised in the Japanese family tradition. During the war English was not taught in the schools in Japan. He was taught to obey his parents, his grandparents, government authority and believe that failure to obey [47] would be punished, and you will recall an example of his, he had a taste of Japanese authority when he was sent up for his draft examination and prior to his examination he was supposed to write down how tall he was and what his weight was. But when he was actually measured they found that he weighed, that there was a difference of ten centimeters in his weight from the information he had given them and what he actually measured, and for giving this incorrect information he was struck by one of the military officials. And then he had an unpleasant experience during one of the air raids when he was dressed in white, with the Japanese police. The evidence further showed that at no time did the plaintiff have any intention whatsoever to lose or give up his American citizenship. The father testified that he wanted his son to come right back home just as

soon as it was possible. That was after the war, and you will recall the testimony of George Takehara, that after the war he went to the office of the Japanese Governor of Osaka Province and was told that an American consulate would be established in Kobe [48] and that he should wait until that time to make his application. And then later on he did make an application for a travel document to come to the United States. Now the evidence further showed, and I think your Honor has judicial notice of the fact that after the war and before the elections under the control of General MacArthur, the Japanese people were told by newspaper, radio and political speeches that in order to build a new Japan and a democratic country, that everyone should vote, and this was reiterated over and over again according to the testimony of plaintiff. He testified that he felt it was an order that he must vote and he was advised that it was his duty to vote. And he was advised that if he didn't vote, that he would lose his ration card which meant, of course, nothing to eat. He explained that every year the heads of ten or so houses elected one to act as head of that particular neighborhood block and this head acts as sort of a liaison between the government and all the residents of this particular block. On election day the head of the block came to his [49] grandfather, this boy's grandfather, and stated in plaintiff's presence that everyone should go to the polls. School children came to his house and told the family to go to the polls.

The grandfather went to the polls first, came back and said the Japanese police officers and

American military police were at the polls and that if he did not vote he would get into trouble and lose his ration card. The plaintiff's uncle, Seiji Fujihara, said he was going to the polls and told the plaintiff to come with him to the polls, otherwise he would lose his ration card and receive other punishment. Now, the plaintiff did not know that he would lose his citizenship if he voted. He did not intend to lose his American citizenship according to his testimony, and from all of the testimony in the evidence here, it certainly wasn't his free, intelligent, voluntary choice, but was done under legal duress, and when the plaintiff learned that such voting would endanger his American citizenship, he voted no more. Now, there is one other statement in regard to the evidence. The father registered the plaintiff's birth [50] with the Japanese authorities but withdrew the registration in 1930. During the war a cousin, not George, but a cousin registered George's birth with the Japanese authorities. The plaintiff himself did not do this as the defendant, I think, mistakenly contended in his brief. His cousin registered his birth because the family in Japan considered it necessary in order to protect themselves against the consequences of having an enemy alien relative in their community. After the plaintiff was denied a travel document this action was instituted. During the war, the defendant, as an enemy alien, was required and did report to the police as an alien, and was not told, was told not to travel without a permit, and was told that he was prohibited from having a camera in his possession. Now, in addition to the

oral evidence adduced at this trial, there was a document introduced by the Government which involves a questionnaire given to the plaintiff, asking him, among other things, about his voting, and he was asked why he did vote. Now, he made that statement to the American consul in February of 1950. [51] He said that he heard that he would be punished if he did not vote. Do you have that exhibit here?

The Clerk: Yes.

Mr. Shucklin: Now, this is the English translation, your Honor, to question 7 and it appears to be the next to the last sheet in this exhibit. "Give detailed statement of your reason for voting." "Overhearing rumors that non-participants were to be punished caused me to vote and I did not know that one loses his American citizenship by voting." Now, as I see it, your Honor, if just one of these three things has been satisfied, the plaintiff's citizenship is not in jeopardy. First, if Japan was a foreign country, two things then are to be considered. First, whether or not the act was unconstitutional depriving him of his citizenship, or, secondly, was the voting done under duress. The next point is, if Japan was not a foreign country under a legal definition, then of course, the act of voting would not endanger his citizenship. However, as far as the Ninth Circuit is concerned, the case of Acheson vs. Kuniyuki, 189 F. (2d) 741, [52] reversed a lower court decision on that point and the present state of the law is according to that decision, that Japan was a foreign state within the meaning of Title 8, U. S. Code Annotated, Section

801, but in holding that the Court reviewed the decisions of the lower courts on the question of duress in voting and they said that, while in some of those cases it was held that Japan was a foreign, was not a foreign country, even if those cases were wrong on that point, they were correct on the point of legal duress as far as voting was concerned. Now those cases are set forth in our brief beginning on page 2 of our first brief. First case is Uyeno v. Acheson, 96 F. Supp. 510. The Court held that the act of an American-born Japanese minor in participating in the 1947 general election could not be held to have been such a deliberate choice of allegiance to another country as to have resulted in expatriation, where the constant reiteration of the importance of voting in such an election had been taken by minor as a command on part of General MacArthur and occupation forces which he could not, with [53] impunity, disobey and where he had been led to believe that if he did not vote he would lose his ration food card.

The Court: Who held that?

Mr. Shucklin: I will have to get 96 Federal Supplement.

Mr. Sakahara: Here it is.

Mr. Shucklin: The Uyeno case, the decision was by District Judge Yankwich and, as I recall in that case, he held that Japan was a foreign state but went on to the question of the election and said that there was a duress exercised on the plaintiff in this particular case.

The Court: How old was this boy when he voted?

Mr. Shucklin: In our case?

The Court: Yes.

Mr. Shucklin: In our case he was a month past twenty-one. In the Tsunashima vs. Acheson, 83 F. Supp. 473, the uncontradicted testimony disclosed that on election day plaintiff refused to vote several times and was finally informed by an officer of the city that unless she voted her food rations would be discontinued. The plaintiff said rather than [54] go without a ration book for herself and grandmother, she yielded and voted. The Court held the facts were clear that she voted under duress, coercion and intimidation which dominated her mind in that she could not fully and voluntarily act at the time she voted, and such voting was not the result of a free and intelligent choice.

The Court: It is a question of fact, isn't it?

Mr. Shucklin: Yes, it is a question of fact.

The Court: So the fact that some other Court held in some other circumstance that it was or was not duress certainly doesn't bind this Court.

Mr. Shucklin: Well, I think it is important for your Honor to be apprised of the decisions of other Courts on this question.

The Court: On a question of fact?

Mr. Shucklin: Yes, it is on a question of fact. Now in Kuwahara vs. Acheson, 96 F. Supp. 38, it was held in that case that the plaintiff voted because he thought he was required to vote and feared the result of disregarding the American occupation authorities' admonition and urging by press and

radio that all eligible voters participate in [55] elections.Thus such act was not voluntary, but impelled by the influence of those whom he recognized as exercising supreme power in Japan. I am not contending that every fact in our case is the same in these other cases. For instance, in our case we have this fact, we have the radio and the press asking and urging them to vote, but he never said in his testimony that he had any direct contact with the American authorities and the only contact he had that was with the American authorities was the fact that there were some American military police at the voting place, but the duress that was exercised on him, of course, was through the Japanese authorities and through his grandfather and uncle and the fact which seems to be a pretty general thing, that these people thought that if they didn't vote they were going to be punished.

The Court: Well, but the difficulty with the whole situation is that you are flying in the face of a congressional statute. I realize that if the statute is unconstitutional, that is a different matter.

Mr. Shucklin: No, I am not discussing the question [56] of unconstitutionality right now.

The Court: I know you are not discussing the question of unconstitutionality, but the statute says if he votes he loses his citizenship. That is flat.

Mr. Shucklin: Yes, but the exception is that if he voted under duress it was not the exercise of his free and intelligent choice.

The Court: Congress doesn't say that.

Mr. Shucklin: That is what the Courts say.

The Court: I know, but I am sitting in the same place as the rest of the Courts and I don't think that the Courts have any business in saying, when Congress passes a statute, if you vote you lose your citizenship, that they should write in a lot of exceptions. The statute is plain. It says flatly, if you vote that is it.

Mr. Shucklin: Yes, but the statute is plain that it has got to be voluntary voting.

The Court: Oh, is it?

Mr. Shucklin: Yes, I would say so.

The Court: What does it say, what is the language of the statute?

Mr. Shucklin: Just exactly what you said, [57] but certainly that is not the legal intendment according to all of these decisions.

The Court: As I say, I don't recognize the authority of any decision that you quoted.

Mr. Shucklin: I know that your Honor is deciding this case on the facts, but I disagree with you very heartily on the fact that you are bound by just the exact wording of that statute without determining whether or not this man actually voluntarily voted.

The Court: I don't know why you say that. Congress passes a statute, that is it. I follow the statute. I don't go around trying to find out the loopholes in it and get around it.

Mr. Shucklin: I don't say this a loophole.

The Court: I think it is. It says flatly that if he votes in an election that settles it. I don't see why I shouldn't recognize the statute as written.

Mr. Shucklin: Well, I think under these facts that the statute applies, but for instance, if he was bound and gagged and forced to vote there wouldn't be any question in your mind at that time of physical duress, that this [58] man was not doing a voluntary act.

The Court: Well, I don't care anything about that because Congress has said flatly that if he votes that is it. Now, I don't know why I should go around and try to find out flaws in the statute. As a matter of fact, it is the presumption that the statute is valid in the language in which it is written. I think that congressional——

Mr. Shucklin: Take the case of Perkins vs. Elg. In that particular case if the Supreme Court followed the exact wording of the statute, there wouldn't be any question of treaty. In your Honor's case, in the Reid case, is another example where your Honor found the real intendment of the act although the case was reversed by an upper court later on. The Supreme Court exactly endorsed your action in the Reid case.

The Court: No, you mistake that because the treaty wasn't in comparable terms of this statute. The treaty was that if the parents were naturalized, then the children should be deemed to be Canadian citizens. The statute and the treaty are not in the exact language. [59]

Mr. Shucklin: Well——

The Court: All I am saying—I haven't decided this case, but all I am saying is that I don't see on what justification these District Courts have gone

on a theory of duress. The statute doesn't say anything about duress. They do not discuss the question. There isn't a single one of them that discusses the question.

Mr. Shucklin: Yes, but the Circuit Court of Appeals has endorsed that action. They cite all these cases with approval.

The Court: They cite them but they don't justify the lower courts in setting aside the statute.

Mr. Shucklin: No, they don't justify the courts in just willy nilly saying there isn't such a statute, no.

The Court: Well, we are writing things into the statute without any doubt in the world.

Mr. Shucklin: Well, I think the whole background is that citizenship, an American citizenship by birth, is a precious thing and shouldn't be lightly thrown away and cast aside.

The Court: I think that is true, too. As a matter of fact, I have stood up for that when a [60] great many other people didn't.

Mr. Shucklin: You bet, and I don't care what Congress says. A person born on this soil has got a vested interest in this soil, and because some State Department official says, Well, you voted and therefore you can't come back to the soil where you were born," I think is a cavalier method of acting, and if the State Department had any feeling for American citizens regardless whether Japanese or English descent or what descent, there should have been a warning to these people stranded in that country, and this boy was stranded. It was by circumstances

that he was there. He had nothing to do with this war. He didn't voluntarily go to Japan. His father sent him. If he had been allowed to go to grammar school here, he probably wouldn't have gone. But the father, I think, on the stand he has become more and more Americanized as he has been remotely connected with Japan, but at the time the boy was that age he had a father and mother back there and he wanted to send the boys back. Certainly it was through no fault of the boy that he was in Japan in wartime, [61] and it is no fault of the boy that he was under the domination of these people in Japan, and without any information as to whether or not he would lose his citizenship. Now, I grant you that the Supreme Court has held that you can't, ignorance of the law is no excuse in a case like that, but it certainly is a circumstance to be considered with all the other circumstances in this case.

The Court: Well, the same situation applies with regard to aliens who have come over here and been naturalized and then they go back to their own country and stay there for two years and then we cancel the citizenship. Now what is the difference between that and this?

Mr. Shucklin: Well, I think there is.

The Court: They don't have to know that that is going to result in the cancellation of their citizenship or anything else.

Mr. Shucklin: I think fundamentally speaking there is a lot of difference between being born a citizen and being naturalized a citizen.

The Court: Do you make a distinction of citizenship in the United States?

Mr. Shucklin: Yes, for the purpose of this [62] argument I say a naturalized citizen has all the rights of a citizen born here, but there are special statutes, and, of course, there are special statutes on naturalization and denaturalization.

The Court: I thought though that there were not to be two classes of citizenship?

Mr. Shucklin: There isn't supposed to be any first and second classes of citizenship and I agree with that, but I say this, that you take away the citizenship of one man by the implication of law who is born here and you take another man's citizenship away because he became a citizen by statute, his citizenship can be abolished by statute.

The Court: I don't think that. I think that we did create two classes of citizenship as far as the Japanese were concerned by interning American-born Japanese in this country who hadn't done anything.

Mr. Shucklin: That is right. That was a creation.

The Court: That created two different classes of citizenship.

Mr. Shucklin: No, we did not have the right to do it. [63]

The Court: If it was so important then, why isn't it important now to recognize this training in Japanese schools and this devotion to the Emperor in formative years of a man's life and up to the time he is twenty-one, and then if he makes some

act which the statute indicates should cancel his citizenship, why isn't Congress absolutely within its authority to pass——

Mr. Shucklin: I don't see that it has the authority to do that. I do say that the facts upon which the citizenship is claimed to be lost should be carefully scrutinized and that is what these District Courts have done.

The Court: Well, I don't think that this man has any training which would indicate to me that he didn't make the choice voluntarily. His training is all as an alien Japanese, educated all the way through and acting directly upon the authority of the people in Japan who are aliens, his grandfather and his uncle.

Mr. Shucklin: He didn't have a choice.

The Court: Why no choice?

Mr. Shucklin: No choice at that time. [64]

The Court: There were American citizens who thought enough of their citizenship that they died by hundreds during the war. I don't see why someone should take chances on citizenship.

Mr. Shucklin: He didn't know that he was taking any chances.

The Court: After all, he is a man of age. Why not? Why isn't the choice free? You take a man who stands up and says, "I am going to be an American citizen and if that requires me to be put in the army, all right, and if I am killed, all right because that is a price that I pay for American citizenship." Here is a fellow that wouldn't take a

chance of anything. He is afraid he will lose his ration card so, therefore, of course——

Mr. Shucklin: It is uniformly held, there are eight or nine decisions on this question of ration card.

The Court: That is a question of fact. I look at it differently. I don't know why an alien Japanese, educated in Japan, can't be thought to make a very impartial choice when he chooses Japanese citizenship.

Mr. Shucklin: He didn't choose it. [65]

The Court: I think he did. I think——

Mr. Shucklin: He was directed to go to the polls.

The Court: Yes, by an alien Jap who isn't an American citizen.

Mr. Shucklin: That is right.

The Court: And the authority—why shouldn't I think that after he got to this country the same alien Jap would tell him to go kill the president? He is bound to do it, of course.

Mr. Shucklin: No, he is not forced to do that.

The Court: That is what you are contending.

Mr. Shucklin: I am contending that when he went to vote that it wasn't his free and intelligent choice.

The Court: If he killed the president it wouldn't be his free and intelligent choice, his uncle told him.

Mr. Shucklin: He went there because of fear of punishment.

The Court: Maybe they will tell him they will

punish him this time. Get rid of this fellow over here for oppressing the Japanese people.

Mr. Shucklin: There is every reason to believe from the evidence, from the fact that he has got a father, mother, brothers and sister [66] living right outside of this town, that his own intention was to come back to be with his family.

The Court: He has got a family in Japan and he was obeying their orders.

Mr. Shucklin: Certainly.

The Court: Now he has changed his mind and wants to obey the orders of people on this side because the Japanese people are involved in things that there is some advantage at this time for having him a citizen of the United States.

Mr. Shucklin: I don't think that is true. Why is there anything so un-American about a family wanting to be together? I don't see it.

The Court: I don't think it is un-American for them to be together, but I think they see a tremendous advantage in having this man an American citizen.

Mr. Shucklin: I don't think that entered into their minds. They figured he was an American citizen. They wanted him home with them where he belonged.

The Court: Why didn't they keep him at home instead of sending him to Japan to be [67] educated?

Mr. Shucklin: That, I can't answer except this, he was to be there a few years and 1941 comes and he can't get back.

The Court: They wanted him educated under the Japanese Emperor system.

Mr. Shucklin: That isn't the fault of the boy.

The Court: I think it is his fault that he gets educated in that situation. I think it is entirely alien to our form of thinking, education of that type. I don't think it made him an American citizen. I think it made him a subject of the Emperor.

Mr. Shucklin: Well, he didn't register his citizenship there.

The Court: I know, but that shows how much he was under the influence of these alien Japanese who were under the domination of that system.

Mr. Shucklin: I can't see anything in the law where he acted under duress to vote that would make him a Japanese citizen.

The Court: Well, I only consider that as one of the factors involved. As a matter of fact, I think he made his choice in the years before. I think that there is evidence to show that he made his choice and that he was going with the [68] Japanese people and that this is only a circumstance. It happens that this circumstance fell within the prohibition of the statute.

Mr. Shucklin: Now I'd like to invite your Honor's attention to the case of Kawakita vs. United States, in 190 F. (2d), page 506. Now this was a treason prosecution against a person born in the United States of Japanese parentage for alleged acts of treason by defendant while residing in Japan during the World War II. There was evidence of defendant's treatment of American prisoners of

war and particularly of defendant's knocking an American prisoner of war into the camp drain or cesspool and striking and beating him as he attempted to get out, and sustained a finding that the defendant committed an overt act which amounted to aid and comfort to the enemy. There are facts in this case which show that he registered himself as a Japanese citizen, but yet the Court did not find in that treason case that Kawakita who did everything to brand him as a Japanese enemy, lost his American citizenship. Now, can there be one principle [69] of law when the Government wants him here to prosecute him for treason and another principle of law where he is merely exercising and trying to exercise his birthright?

The Court: Oh, sure, I think there is no doubt about that case being a treason case. I don't think you can escape a charge of treason just by going over because that is treason in itself, going over.

Mr. Shucklin: Still the same statutes apply. Following that other reasoning then, this man has become a Japanese citizen and has not committed treason by the mere fact that he registered as a Japanese citizen.

The Court: I don't think that had anything to do with it.

Mr. Shucklin: I think, your Honor, the same principles of law apply.

The Court: I don't. I don't think that you can give up your American citizenship and commit treason without being punished.

Mr. Shucklin: Then conversely speaking, this

man after he voted, and we will say for the purposes of argument, after he voted he committed an act of treason—I am talking about [70] Takehara—he could defend himself on the ground that he was not an American citizen at the time he committed the so-called act of treason under the same reasoning as in the Kawakita case.

The Court: I don't think so. Besides, the war is over as far as that is concerned. I think that perhaps a man during time of war couldn't give up his American citizenship in order to attack the United States. That would be a very easy out.

Mr. Shucklin: Yes, but we have this situation where it is all past just like in the Kawakita case. He registered as a Japanese citizen voluntarily himself, stayed out the requisite period of time. This man Takehara, we will say, loses his citizenship by virtue of the fact he voted in this Japanese election. We will say that two years later during the Korean war he collaborated with the North Koreans. There is an act of treason. Now, if he was——

The Court: That is right.

Mr. Shucklin: ——a Japanese and because he lost his American citizenship by voting, he [71] couldn't be charged with treason against the United States, and that is the same reasoning as this Kawakita case. Now we have the case of Rokui vs. Acheson, 94 F. Supp. 439, holds along the same lines that I have stated. Yamamoto vs. Acheson, 93 F. Supp. 346 and Ouye vs. Acheson, 91 F. Supp. 129 holds the same thing from a factual standpoint. Then, of course, we have the Murakama case which I believe

your Honor is familiar with in which they held that a renunciation of citizenship while incarcerated pursuant to civilian exclusion orders issued during World War II, was not the result of a free and intelligent choice, but rather because of mental fear, intimidation and coercion, and that the renunciation was void and of no effect. Well now, there is another case that we can reason from. Murakama was in a camp and, as your Honor said, they were treated as second-class citizens. No physical harm was visited on him and I imagine no physical pressure was used to make him renounce his orders, renounce his citizenship, and one of the reasons for it was the fact that he didn't [72] want to work for Nine Dollars a month whereas other American citizens were working for a lot more than that, but still, pursuant to an exclusion order pursuant to a statute, he renounced his American citizenship and the Court held that it was not a result of a free and intelligent choice. Now, the question of unconstitutionality is considered in Okimura vs. Acheson. I don't intend to argue that point, but merely to submit that case for your Honor's thinking on the subject. I understand that that case is being heard by an Appellate Court, is that correct?

Mr. Dovell: As far as I know it is, yes.

Mr. Shucklin: I think there is one other case that I should refer to at this present moment and that is the Fujizawa case. In Fujizawa vs. Acheson, tried by District Judge Weinberger, the syllabus says evidence established that application for recovery of Japanese citizenship made by plaintiff, a per-

son of Japanese ancestry, born in the United States, and who was temporarily in Japan during the years which allegedly resulted in loss of his United States citizenship, was not a free and [73] voluntary act of the plaintiff and the plaintiff never intended to renounce his United States citizenship; and in that particular case the Court went into the question of how the Nisei or the American citizens were treated in Japan and the fact that they were stranded there and more a subject of pity rather than of condemnation. It says here, "The testimony of Thomas L. Blakemore, a resident in Japan who was formerly language officer in the United States Army and formerly legal assistant in the Office of the United States Political Advisor in Tokyo, and at the time of the trial of this case, was employed under the Supreme Commander of Allied Powers as Chief of Civil Affairs—" said this, "During World War II the Nisei who had renounced their Japanese Nationality were in a difficult position because of inability, as aliens, to obtain the generally used and accepted proof of identity available only to persons of Japanese Nationality, to wit, copies of the Family Register Record; in Japanese society the Family Register Record is used for many purposes, and is a necessary step in connection with marriage, negotiations, schooling, employment and during time of rationing of food, clothing and housing, and when restrictions were placed on residence and movement about the country, the need for a Family Register Record became even stronger——"

The Court: Well, Judge Weinberger is considering a special set of facts. That is not binding on me at all.

Mr. Shucklin: I understand that that is not.

The Court: And I don't think it is persuasive in the least. I think these Courts are carried away emotionally. We are the conquerors and therefore we should give everything away. I don't believe that at all because it seems to me that it is strictly a question of fact. Now just because this boy has loyal American citizens on this side, is no reason for me to believe that he is a loyal American citizen. He might be a communist as far as I know. I don't see any reason why I should believe that under the domination——

Mr. Shucklin: There is no evidence that he is a communist that I know of in the record.

The Court: I know, but there is no evidence that [75] he isn't either.

Mr. Shucklin: I don't think he has to prove if he is a communist or not.

The Court: I know he doesn't, but he does have to convince me that his training and such is of a nature so that I would not think that this was a voluntary act on his part if I am going to consider that at all. As a matter of fact, I think the congressional statute is sufficient without worrying about that. But he voted in Japan. That is the answer. Congress has said so. Why should I go out of my way to create exceptions? That is, if he ever was an American citizen. He got the citizenship by birth and I think he elected Japanese citizenship. I think

it is very obvious that he elected Japanese citizenship.

Mr. Shucklin: I don't see anything in the record that shows that he elected Japanese citizenship.

The Court: I think there is. He voted.

Mr. Shucklin: That is exactly what we are arguing about here.

The Court: Well, I think it was an election myself. [76]

Mr. Shucklin: I don't think it is necessary that there is any judicial legislation in order to create the fact that if he did it involuntarily or under duress that the statute didn't apply.

The Court: I think it is judicial legislation writing something in the statute that is not here.

Mr. Shucklin: Duress has always been—if you steal, if you murder, there isn't anything in any statute, any criminal statute that says that if it is done under duress it is a defense, but it is a part of the law.

The Court: I don't think that is true. You try saying in a criminal court that somebody told you to go kill him or you would lose your ration card if you didn't kill him. Do you think that would be a defense?

Mr. Shucklin: That isn't a defense in that matter, of course not.

The Court: Neither in this, either.

Mr. Shucklin: I will take an analogy of a wife under duress by her husband to commit a crime. There isn't any Federal statute that says that that is a defense, but it is under the common [77] law,

and that is a good and valid defense on the prosecution of a wife.

The Court: It isn't any more. That is only survival of medieval rule that that was a defense at one time. It isn't any more because I have tried it. I have tried it where that defense was put up. I have seen it convicted. Well, bank robbery for instance, a woman claims she was acting under the duress of her husband. I put it up to the jury and they said she wasn't and here I am the trier of the fact.

Mr. Shucklin: You are the trier of facts, of course.

The Court: I don't see that because some other judge is affected by emotionalism—I think a lot of them are. I think that that is just the explanation of these things, but the statute of Congress says flatly that if he voted that is one thing, but I think that isn't the gate that we come to first. The first gate we come to is whether he had not, by his course of conduct, already elected Japanese subjection to the Emperor before he ever got to this point. I think it is only an additional straw in the wind. [78]

Mr. Shucklin: No, but the State Department said you lose your citizenship because you voted in this April election.

The Court: That doesn't make any election if they chose that. If I think he is not an American citizen, I am certainly not going to admit him.

Mr. Shucklin: Let me ask you this then, suppose he hadn't voted, does your Honor contend then that you could find that he wasn't?

The Court: Oh, absolutely.

Mr. Shucklin: That he wasn't an American citizen?

The Court: Absolutely, no question about that. That is the way these choices are generally made. Here is an opinion right here. You can look at it. This woman is an American citizen contending that she should still be considered an American citizen notwithstanding the fact that she married a French citizen when she was nineteen years of age.

Mr. Shucklin: Of course that is not the same as the renunciation, this is renunciation under statute. It certainly isn't one.

The Court: No, it is not a renunciation under statute, just common law renunciation. She tried to claim she never intended to be anything [79] but an American citizen, but the evidence is to the contrary. A very reasonable opinion, I think, but it is an opinion on fact.

Mr. Shucklin: There isn't anything in this case that showed outside of this election, of this voting, that he had any intention of being a Japanese citizen.

The Court: I think so. His whole course of conduct showed, his education, everything else. Everything pulls him toward Japan. I don't think anything about a command of his father now, subsequently.

Mr. Shucklin: But the only way he could become a Japanese citizen under the other branch was that he voluntarily become one by making a declaration and making an application. He never did.

The Court: I don't think so at all; I don't think

that that is true. I think his education and everything points to the fact that he intended to be a Japanese. Now he is Japanese. That is it.

Mr. Shucklin: I'd like to reserve the rest of my argument in rebuttal, your Honor.

The Court: There isn't going to be any rebuttal. [80] Go ahead and make any argument you want now. I have pretty well determined this case on the facts as far as I am concerned. I have pretty well made up my mind that this man made an election in Japan and in the first place didn't have an American citizenship to renounce, and if he did have he renounced it under the statute.

Mr. Shucklin: Of course he had the American citizenship to renounce. He was born here.

The Court: Well, I don't think he did at the time he voted, but if he did, why then he voted. That settles it, regardless.

Mr. Shucklin: Well, there are nine decisions, most of them are on weaker facts than the one we have here that held that that voting was done under duress.

The Court: Well, I know that is just a District Judge's opinion. I am just as competent to pass on these facts as any District Judge.

Mr. Shucklin: The Circuit Court of Appeals has okayed these decisions of this circuit.

The Court: If they want to reverse me on a question of fact, it is up to them.

Mr. Shucklin: I know that is a hard thing to do. [81]

The Court: No, it is not hard for the Court of

Appeals of the Ninth Circuit. They do it all the time. They haven't any business, but they do it. That wouldn't affect me. I have to decide the thing the way I see it. In the first place I hold that this act is not unconstitutional, the long history to the contrary in the Mackenzie vs. Hare, and it was considered in the Reid case and considered in the Elg case, so I think there is no doubt about the constitutionality of the statute. In the second place, Japan is a foreign country and the mere fact that occupation is by American trops has nothing to do with the structure of the country's government. The Americans going in there take over and become a part of an alien government under those circumstances. That is well laid down in the whole series of cases which we have in the military governments that were set up in the occupied states during the civil war, and in the next place, this man had a choice of citizenship after he passed twenty-one. He had to be one or the other and it was only a question of which one you think he was. I [82] think when he passed twenty-one, in my opinion, that he had chosen Japanese citizenship and chosen to be under the domination of the branch of the family that was then in Japan and to obey their orders, and they were aliens and, therefore, I think that he made a deliberate choice. He is twenty-one years old and I don't know why a person can't elect—I do use the circumstance that he voted in the election there to show that that choice was confirmed by voting at a Japanese election, but if he had not lost his American citizenship by that choice, then he lost it by vot-

ing in an election contrary to an Act of Congress, and I am not going out of my way. I don't think the circumstances here indicate duress at all. I don't think there is even a syllable about duress in here except there is some talk about mental control and family discipline and a few things like that. Well, that is not duress. No one ever held it was duress and in a civil case it won't get you anywhere. In a criminal case it won't get you anywhere. It is just duress that is created for the purpose of letting these people expatriate themselves or repatriate themselves, [83] and under the circumstances it wouldn't hold in a contract or hold in a criminal case and I don't think it holds here, so all in all I am very much of the opinion that I have to hold against this. I think that the whole testimony in court bore me out in that regard. These people, it is true I have held—I think very strongly in favor of these American citizens who tried to hold onto their citizenship in this country, but I never changed my opinion about the Yasui case. I think there was a deliberate choice there also and I don't think the Supreme Court reversed that at all, they simply held that in that regard it had nothing to do with the statute. The statute was to create two classes of citizens of native born Japanese ancestry and native born of American ancestry, and as a result it segregated them and that question of citizenship had nothing to do with the case. That is what the Supreme Court said, but I don't think they reversed me on the question saying that Yasui too had chosen Japanese citizenship.

Mr. Shucklin: That wasn't considered.

The Court: And as a result of the whole [84] thing I may be out of line on the holding of a question of fact, but I am going to hold on the question of fact because I see it.

Mr. Shucklin: There is another case I'd like to cite to your Honor if you don't mind. There is just one more decision, if your Honor will bear with me.

The Court: Yes, the case of Vegetable Farms vs. United States. The Court of Appeals of the Ninth Circuit reversed the Tax Court of the United States holding that because they tried to operate their corporation although they were interned, they were not entitled to be further penalized by the Tax Court on the ground that they rendered no services for their corporation. Very interesting case. I thought the Tax Court went off on the settlement that was developed during the war. At least let the Japanese claim production on the same basis as other American citizens.

Mr. Shucklin: I think Mr. Sakahara was going to bring in one of the decisions. The only point in my mind is that I am still not clear, your Honor, how, without a violation of any of these subdivisions of Title 6, Section 801 [85] (a) through (j), that a person could be denied his citizenship.

The Court: You will find that the defendant in that case that I gave you, that sort of thing, nationality acts aren't the only ones. This is a proposition of general law that at twenty-one a person has a choice and they exercise that choice one way or the other. This dual citizenship business, there

is no question at all that under Japanese law this man was the subject of the Emperor just as much as he was by the American Constitution a citizen of the United States by birth on American soil. Now then, when he gets twenty-one, why he has to choose one way or the other and that is the only way we can find out, by one method or the other, what his intention was. I certainly don't think there is anything in the record to show his intention was to claim American citizenship. The way I interpret that, is that after the thing got along his father decided that it would be advantageous for him to be an American citizen. I think his family are American citizens. I don't think there is any question about that part, and I don't impute [86] anything to the contrary, but then you have to consider these cases on the basis of the individuals. I don't think you can take one individual and say because he did certain things that somebody whose entire education and course of training and personal attitude is a different type, that he must be made an American citizen because his family are American citizens. As a matter of fact, we have that same situation in our country where during the civil war there were people on both sides who belonged to the same families. While we are waiting, I read a summary about this, counsel. Would you like——

Mr. Dovell: I just want to address the Court briefly.

The Court: All right. If you will go ahead with

your argument, and I will have Mr. Shucklin cite his case in rebuttal.

Mr. Dovell: Your Honor, I do not agree with the facts of the Kawakita case as stated by counsel. I think that Kawakita maintained his status as an American citizen because the facts stated that he, on page 508 of 190 Fed. 2d, that he entered this Meiji University in [87] March, 1941, where he took a course in commerce and also received military training. In April, 1941, he renewed his passport. It isn't that he kept up his Japanese citizenship, it is that he kept up his American citizenship and was certainly subject to treason. Now, in the case before the Court, what has this man done that he could be charged with treason, on what basis could he even be charged with treason if he committed acts in Japan similar to what Kawakita had committed? He was Japanese all the way through. There is nothing in the record to show that he was otherwise. At the time he voted he had not committed himself to the choice of American citizenship so that under the circumstances such as in the Kawakita case he could have been prosecuted for treason if he had committed acts favorable in behalf of the enemy. When he voted he very likely voted in the same spirit as any other Japanase voted in Japan. He was inspired by the same urge to vote. Now certainly, the Supreme Court as well as the Congress has indicated that some limitation should be set upon the time of exercising this choice, and [88] it was three years, practically four years after he had attained his

majority that he undertook to obtain a passport. True, he might have intended to do so before, but he was waiting until it was convenient for an American consulate to be set up near by. As far as the District Courts are concerned, in Uyeno vs. Acheson, 96 Fed. Supp., 510, is about the only District Court that considers the matter of limitation as far as I could find, but the Supreme Court did consider in——

The Court: What was that citation again?

Mr. Dovell: That is the case of Uyeno vs. Acheson, 96 Fed. Supp., 510, and that was considered on page 520, your Honor.

The Court: The Supreme Court of the United States, as I understand, recently reversed the Tule Lake cases in saying expressly that the intention in those cases was the question of fact, isn't that right?

Mr. Dovell: I have a note here from the secretary, Miss McCoy, in which she says Judge McLaughlin was reversed by the United States Supreme Court on January 2nd involving voting by the Japanese, 99 Fed. Supp. 587, and the companion [89] case 591. I am not sure about the other, your Honor, but I have that note. The Government's position is stated in the Government's brief on page 3 of our brief, your Honor, line 7. The Government's position is that, "in view of the plaintiff's Japanese antecedents, upbringing and schooling in Japan, his naturalization as a Japanese national, and in view of his admitted ignorance of the effect of his voting upon his claim to

American citizenship, it would appear that the plaintiff had no reason to abstain from voting." That I say with reference to voluntary or involuntary voting. There is another consideration with reference to voluntary voting, and that is he found it convenient not to vote again when he heard about the possibility of loss of citizenship, American citizenship. But a person that is of dual nationality, as I take it your Honor, has that dual nationality without any election on his part to be a Japanese citizen. He had that dual nationality. It was already there. He didn't have to elect to be a Japanese. He was there in that country. The obligation was upon him to elect or to assert his American [90] citizenship. That is all I have, your Honor.

Mr. Shucklin: Your Honor, I would only reiterate what I said before. I think that your Honor might well hold that there was duress in this case. I think this boy's testimony was consistent. The fact that he had made that statement to the American consul at Kobe that it was under fear of punishment that he did vote, the fact that when he learned that voting would endanger his citizenship he voted no more, all those facts are consistent with American citizenship and inconsistent with Japanese citizenship and consistent with our theory in this case that when he went to the polls in Japan that he voted under duress and not under his free and intelligent choice.

The Court: I will write a memorandum in this case.

Mr. Shucklin: Your Honor, should we find some other cases that might be of some help to our cause, may we send a copy to counsel and send one to you?

The Court: Yes, any time Mr. Shucklin.

Mr. Shucklin: Thank you.

The Court: Court is in recess.

(Whereupon, Court was recessed at 11:50 a.m.) [91]

Certificate

I, Adele U. Douds, official reporter for the within-entitled court, hereby certify that the foregoing is a full and complete transcript of matters therein set forth.

/s/ ADELE U. DOUDS.

[Endorsed]: Filed August 5, 1952. [92]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting here-

with all of the original papers and pleadings and exhibits in the above-entitled cause, except such papers and pleadings which were stipulated by the parties hereto to be omitted from the Record on Appeal, and the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Judgment of the above-entitled Court, filed and entered on August 9, 1952, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

1. Amended Complaint (filed Nov. 13, 1951).
2. Answer (filed July 27, 1951).
3. Plaintiff's Proposed Findings of Fact and Conclusions of Law (lodged Apr. 10, 1952).
4. Plaintiff's Proposed Declaratory Judgment of Citizenship (lodged Apr. 10, 1952).
5. Opinion (filed July 24, 1952).
6. Defendant's Findings of Fact and Conclusions of Law (lodged Apr. 7, 1952; filed Aug. 9, 1952).
7. Judgment of Dismissal (lodged Apr. 7, 1952; filed Aug. 9, 1952).
8. Plaintiff's Notice of Appeal (filed Aug. 19, 1952).
9. Cost Bond on Appeal (filed Aug. 19, 1952).
10. Reporter's Transcript of Testimony (filed Aug. 5, 1952).
11. Appellant's Statement of Points on Appeal (filed Aug. 29, 1952).
12. Stipulation for Designated Parts of Record

to be Omitted from the Record on Appeal (filed Sept. 2, 1952).

and correspondence included in said case, identified as follows:

13. Letter, dated 4/9/52, Shucklin to Clerk.

14. Copy of letter, dated 4/10/52, Clerk to Judge Fee's secretary re transmittal of Plaintiff's proposed Findings of Fact, Conclusions of Law and Judgment.

15. Copy of letter, dated 8/13/52, Clerk to Judge Fee's secretary requesting return of Pltf's proposed Findings, etc.

16. Letter, dated 8/18/52, Shucklin to Clerk re filing Notice of Appeal.

17. Copy letter, dated 8/19/52, Clerk to Shucklin re appeal fee.

18. Letter, dated 8/20/52, Shucklin to Clerk, remitting fee.

19. Letter, dated 8/28/52, Judge Fee's secretary to Clerk, returning Pltf's proposed Findings, etc.

20. Copy letter, dated 8/28/52, Shucklin to U. S. Attorney re Transcript of Testimony.

21. Copy letter, dated 8/28/52, Shucklin to U. S. Attorney, re Appellant's Statement of Points and Stipulation of Designated Parts;

Also transmitted are the following original exhibits which were admitted in evidence at the trial of the above-entitled cause, to wit:

Plaintiff's Exhibit #1—Certificate of Loss of Nationality of U. S.

Defendant's Exhibit #A-1—Certified Transcript of Records of Dept. of State.

Defendant's Exhibit #A-2—Questionnaire (in Japanese and in English).

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit: Notice of Appeal (Plaintiff), $5.00, and that said fee has been paid to the Clerk by the Plaintiff.

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court, at Tacoma, Washington, this 19th day of September, 1952.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ E. E. REDWAYNE,
Deputy.

[Endorsed]: No. 13555. United States Court of Appeals for the Ninth Circuit. George Takehara, Appellant, vs. Dean G. Acheson, Secretary of State of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed September 22, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13555

GEORGE TAKEHARA,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State,

Appellee.

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT ON APPEAL AND DESIGNATION OF RECORD FOR PRINTING

Comes now George Takehara, the appellant, and pursuant to subdivision 6, Rule 19, of the Rules of the United States Court of Appeals for the Ninth Circuit, herewith adopts the statement of points filed by appellant in the District Court upon which this appellant intends to rely in this court and cause; and with the foregoing statement, the said appellant designates as necessary for the consideration of said appeal all that portion of the original papers of record in this cause and exhibits therewith certified and transmitted by the Clerk of the District Court to the United States Court of Appeals for the Ninth Circuit in this cause, pursuant to stipulation of parties covering omissions from

record on appeal with the exception of documents therein named.

Dated this 27th day of September, 1952.

/s/ TORU SAKAHARA,

/s/ GERALD SHUCKLIN,
Attorneys for Appellant,
George Takehara.

Service of copy acknowledged.

[Endorsed]: Filed September 30, 1952.

No. 13555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE TAKEHARA,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

HONORABLE JAMES ALGER FEE, *Judge*

BRIEF OF APPELLANT

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No. 13555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE TAKEHARA,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE JAMES ALGER FEE, *Judge*

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IN THE

United States Court of Appeals

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GEORGE TAKEHARA,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE JAMES ALGER FEE, *Judge*

BRIEF OF APPELLANT

JURISDICTION

This action was brought in the United States District Court for the Western District of Washington, Southern Division, under authority of Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, on the ground the Appellant is a national and a citizen of the United States since birth by virtue of

the Fourteenth Amendment to the United States Constitution having been born in Firwood, Pierce County, Washington, United States of America and claims his permanent residence as Fife, Pierce County, Washington, in the Southern Division of the Western District of Washington and that said 8 U.S.C.A. 903, conferring jurisdiction on United States District Courts reads in part as follows:

> "If any person who claims a right or privilege as a National of the United States is denied such right or privilege by any department or agency, or executive official thereof, upon the ground that he is not a National of the United States, such persons, regardless of whether he is within the United States or abroad, may institute an action against the head of such department or agency in the District Court for the District of Columbia or in the District in which such person claims a permanent residence for a judgment declaring him to be a National of the United States."

The section further provides that if such person is outside the United States when he institutes his suit he may obtain from the diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be deported in case it shall be decided that he is not a

National of the United States. This is set forth in the Amended Complaint (R. 3).

STATEMENT OF THE CASE

This is an action under the Nationality Act of 1940 (Title 8 U.S.C. Sec. 903) against the Secretary of State of the United States of America for a decree adjudging plaintiff to be a citizen of the United States of America.

The appellant was born in Firwood, Pierce County, Washington on March 13, 1926 (R. 47). His father had come to the United States in 1908 (R. 44) and lived in Fife, Pierce County, Washington since 1920 (R. 39). His father and mother had five children, including himself, all born in the United States. One son, Shoichi, died in action in Europe in 1945 while a member of the United States Army. Appellant resides with his father, mother, sister and brothers at Fife, Pierce County, Washington.

When appellant was nine years of age and after having had three years schooling here, his father took him and his brother, Shoichi, to Japan to be with their grandparents. Shoichi was brought back to the United States in 1939 and appellant was to come back in a few years but the war intervened so that this could not be accomplished. Appellant was

only in Japan temporarily and was to come back home to live with his father (R. 42).

Appellant was given the American first name of George and was never given a Japanese first name (R. 43).

Appellant attended school in Japan for nine years (R. 48). He was taught implicit obedience to his parents, grandparents and governmental authorities. He believed that if he were not obedient he would be disciplined (R. 48).

The appellant never served in the Japanese Army but was called up for physical examination (R. 48). When he went to be examined he noticed that the strict obedience to orders was required. He was kicked and was struck four times for trivial reasons. When answering questions his voice was too low so he was struck. He made a mistake as to his height and he was struck and reprimanded (R. 49). Also, during an air raid he was disciplined for wearing white clothing by the Japanese Military Police and regular city police.

Appellant was registered with the Japanese authorities by his cousin at the request of his grandmother. This was done because he was treated as a foreigner and was required to report to the police station and forbidden to carry a camera and could not

travel without permission. In addition to urging by his relatives the village officer asked him to register. His relatives felt that he was a disgrace on the family because he was an alien. (American), (R. 51 and 52).

Appellant testified that he never intended to lose his American citizenship and was thinking all the time about coming back to the United States to be with his family (R. 52).

After the war he made efforts to get in touch with the family about coming back to the United States. He received a letter from his parents telling him that he should come back to the United States immediately. He went to the foreign department in the Governor's office and asked them what to do. (R. 52). He was 21 at the time. He was told that there was an American Consulate's office in Yokohama but that in the near future there would be an American Consulate established in Kobe and that he had better wait until then.

He wanted to go to Yokohama but couldn't make it so he waited until the American Consulate in Kobe was established. About six months after the election of April 5, 1947, appellant went to the American consulate about returning to the United States. They would not give him any application forms because he

told them he had voted. (R. 57). This was the first time he heard that voting jeopardized his American citizenship (R. 58).

Appellant heard about the Japanese elections of April, 1947 through newspapers, radios and political speeches. "We were told that we should cooperate with the Japanese government and everybody should go for the election." He thought that he was personally requested to vote. (R. 53).

Appellant testified that the block leader or head of the block is elected by the head of the household of each family. He was a liaison person and his duties and authority were to receive any orders from the village officer and transmit them to the individuals in his particular block or neighborhood. (R. 54).

At the time of the April, 1947 elections, the block leader visited every family and asked them to go to the polls. The block leader asked his grandfather, in appellant's presence, to go to vote and to get the rest of the family to go to the polls. Appellant's grandfather went to vote and when he returned he told appellant that there were Japanese police and American military police at the polls. He also told appellant that if he didn't go to the polls he might get into trouble such as cancellation of his food ration card or be involved in some other trouble. He said

that all the neighbors were talking about it and told him that he had better hurry up and go (R. 55). On election day appellant also had a conversation with his uncle. His uncle requested him to go to the polls and told him "If you don't go to the election at this time you might get involved in a very deep trouble. I am going now so you might as well come along with me." His uncle conveyed the same message to him as his grandfather, so then appellant went to the polls with his uncle. There he saw the American military police as well as the Japanese police (R. 56).

In his questionnaire for the American Consul at Kobe, Japan (Defendant's Exhibit A-2, R. 88), appellant stated his reason for voting as follows:

"Overhearing rumors that non-participants were to be punished caused me to vote and I did not know that one loses his American citizenship by voting."

POINTS ON APPEAL

Appellant's Statement of Points on Appeal is set forth on pages 30 and 31 of the Transcript of the Record and are adopted as a part of this brief.

SPECIFICATION OF ERRORS

1. That the Court erred in not adjudging and not finding that George Takehara is a citizen of the

United States of America inasmuch as he was born in the United States and committed no act that would deprive him of his birthright as an American citizen.

2. That the Court erred in not finding and not adjudging that the voting of George Takehara in the April, 1947 election in Japan was done because of fear of punishment, duress or coercion and that the Court erred in not adjudging and not finding that such voting was not the free, voluntary and intelligent choice of George Takehara.

3. That the Court erred in rejecting the doctrine of duress as applied to voting in foreign elections.

4. That the opinion, findings of fact, conclusions of law and judgment of dismissal entered by the Court are contrary to the evidence and contrary to the law governing the case for the following reasons:

(a) The uncontradicted evidence shows that appellant voted because of fear of punishment, duress or coercion and said voting was not the free, voluntary and intelligent choice of the appellant.

(b) That appellant within six months after attaining majority went to the American Consulate at

Kobe, Japan to apply for permission to return to the United States and was not permitted to do so.

(c) In declaring that the appellant was a Japanese national during his minority and thereafter, and in declaring he was forgetful of the ways of the land of his birth, and in denying him consideration as an American citizen because he was brought up during the part of his minority in the language and customs of Japan.

(d) In finding that appellant voted only because he obeyed a direction of his grandfather and uncle (Opinion R. 25) to vote at the election without finding duress and without considering appellant's immaturity and the implied as well as expressed fear of punishment by way of loss of ration card or other "trouble".

5. That the Court erred in refusing to make and enter plaintiff's proposed findings of fact, conclusions of law and erred in refusing to make and enter plaintiff's proposed declaratory Judgment of Citizenship for the following reasons:

(a) That the evidence showed that the appellant voted because of fear of punishment, duress or coercion and said voting was not the free, voluntary and intelligent choice of appellant,

(b) That there was no evidence whatsoever upon which to base a deprivation of the appellant's birthright as an American citizen.

ARGUMENT
THE QUESTION OF INVOLUNTARY VOTING

As the Specification of Errors and Points on Appeal concern matters which are interrelated they will be considered together.

The statute involved is Title 8 U.S.C.A. Sec, 801 provides as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

In *Acheson vs. Kuniyuki*, 189 F. (2d) 741, the Court of Appeals for the Ninth Circuit declared Japan to be a foreign state within the meaning of Title 8, U.S.C.A. Sect. 801, but it also recognized the principle of involuntary voting as having no effect on United States citizenship.

In analyzing the *Uyeno, Tsunashima, Yamamoto, Seki, Yada, Rokui, Kuwahara* and *Ouye* cases infra cited with approval in the *Kuniyuki* case, supra,

in which these American citizens were coerced into voting by being told or made to fear that, unless they voted their food rations would be discontinued, we find that the case at bar comes well within this rule. The case of *Furuno vs. Acheson*, 94 F. Supp. 381 was also approved in that decision; the Furuno case held that the facts established that when the plaintiff voted she did so as a result of mistake, misunderstanding, undue influence and coercion which dominated her mind.

Uyeno vs. Acheson, 96 F. Supp. 510 cited by the Court of Appeals for the Ninth Circuit in the Kuniyuki case is a decision by District Judge Yankwich which is in agreement with the holding the Appellate Court. Judge Yankwich held that the act of an American-born Japanese minor in participating in the 1947 general election could not be held to have been such a deliberate choice of allegiance to another country as to have resulted in expatriation, where the constant reiteration of the importance of voting in such an election had been taken by the minor as a command on part of General MacArthur and occupation forces which he could not, with impunity, disobey and where he had been led to believe that if he did not vote he would lose his food ration. Quoting from that case:

"In the present case, the testimony of the plaintiff is that the constant reiteration through newspapers and over the radio, and by friends and advisers of the importance of voting and the need for voting was taken by him as "a command" on the part of General MacArthur and the Occupation Forces to vote, which he could not, with impunity, disobey. Indeed, he testified that, in addition to this, he was led to believe that if he did not vote, he would lose his food ration card. The essential foods on which the Japanese diet is based,—rice, soy, sugar, and the like,—were on the ration list. It is inconceivable that anyone could have remained alive in occupied Japan if he had been deprived of the means of lawful access to these staples. Singly, and together, these pressures, as envisioned by the plaintiff, are the real sources of his action. Motive does not, necessarily, detract from the nature of a voluntary act. But the facts we are considering go beyond mere motives. They are of a character which shows that the pressures exercised upon the plaintiff were so great that his participation in the election was not his voluntary act. I feel that the Consul, in his finding, and the Department, in endeavoring to sustain it, have, unconsciously perhaps, stressed too much the absence of an act of physical coercion. But in the realm of human action, modern psychology teaches us that group and individual pressures acting upon the needs of a person may be so overpowering in their nature as to overcome individual will and accomplish what physical violence could not."

"This is especially true in the case before us. We are not confronted with an adult who, given a deliberate choice between acts which express allegiance to the United States or allegiance to a foreign country, makes

a free choice, with full knowledge, and who, under the circumstances, should be held to its consequences. On the contrary, we are dealing with an immature young man,—an American-born Japanese,—whose citizenship was conferred on him by the 14th Amendment to the United States Constitution. See, *United States vs. Wong Kim Ark*, 1898, 169 U. S. 649; 18 S. Ct. 456, 42 L.Ed. 890; *Morrison vs. People of State of California*, 1934, 291 U. S. 82, 85, 54 S.Ct. 281, 78 L.Ed. 664. Taken to Japan at the age of four and one-half years, he was, without consultation, educated like a Japanese child. At no time after reaching maturity was he requested to make a choice indicating his allegiance to the United States. As a student in the technical school, he worked part-time in a factory which manufactured products which were probably used in the war effort. He learned as much English as he was taught in school, having forgotten whatever English he may have picked up in his childhood before leaving for Japan. In 1941, he expressed a desire to go to the United States. Although his parents did not object, he could not obtain passage. It is also significant that a brother and sister, evidently older, made their way to the United States before the beginning of the war, and their right to claim American citizenship was not challenged. Indeed, as stated before, the brother returned to the State of Washington and registered for the draft under the Selective Act of 1940. There is nothing in the action of the plaintiff from which any inference of deliberate choice of allegiance to another country could be inferred. See, *Podea vs. Acheson*, 2 Cir., 1950, 179 F. (2d) 306."

To the same effect are the following citations mentioned with approval in *Acheson v. Kuniyuki*,

supra: *Tsunashima v. Acheson*, 83 F. Supp. 473; *Kuwahara v. Acheson*, 96 F. Supp. 38; *Seki v. Acheson* and *Yada v. Acheson*, 94 F. Supp. 438; *Rokui v. Acheson*, 94 F. Supp. 439; *Yamamoto v. Acheson*, 93 F. Supp. 346; *Ouye v. Acheson*, 91 F. supp. 129, and the recently decided cases, *Naito v. Acheson*, 106 F. Supp. 770 and *Furuno v. Acheson*, 106 F. Supp. 775.

The lower Court did not agree with the above cited decisions (R. 25) and thought that courts were carried away emotionally (R. 114) and saw no justification for the theory of duress in the decisions cited by appellant (R. 102, 103). The Court said: "In any event, the fear of loss of food rationing card is not sufficient to raise the doctrine of duress in commercial transactions, and no good reason is seen why it is acceptable in an important transaction of this type." (R. 26)

The appellant submits that the lower Court was correct in stating that any matter affecting the birthright of American citizenship is an "important transaction" but that is was not correct on the subject of duress on which the general law is stated in 17 Am. Jur. Duress and Undue Influence, Section 11 from which we quote at pages 884 and 885:

> "There is no legal standard of resistance with which the person acted upon must comply

at the peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case, is, Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? *Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim. The means used to produce that condition, the age, sex, state of health, and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously what will accomplish this result cannot justly be tested by any other standard than that of the particular person acted upon.* His resisting power, under all the circumstances of the situation, and not any arbitrary standard, is to be considered in determining whether there was duress. Any threats of personal violence may constitute duress, whether of a nature such as would do so under the common-law rule, as, for instance, a threat to kill the person coerced, or merely of battery to his person, provided the threats in fact compel him to do an act which otherwise he would not have done. It is generally held, however, that the threat must be of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by the person while in that condition; and that an act subsequent to the time when the threats were employed will not be considered as having been

> done under duress. If, however, the threats were long continued, and the act which it is sought to avoid was done such a short time thereafter as to indicate that the mind of the person was still under the influence of the threats, it has been held that this will constitute an act done under duress. The mere fact that a person is in fear of some impending peril or injury, or in a state of mental perturbation at the time of doing any act, is not sufficient ground for holding that the act was done under duress; nor can there be duress per minas from mere advice, direction, influence, or persuasion." (Italics ours)

From the above quotation, it is clear that "all of the circumstances" must be considered in determining whether the act was or was not under legal duress.

The Lower Court in its opinion (R. 25) says:

> "The Court does not accept the story that he voted because he feared the loss of his ration card, *but does believe that plaintiff obeyed a direction of his grandfather and uncle, both citizens of Japan to vote at the election* and that he did not know that the act would cause his expatriation." (Italics ours)

The Lower Court said further (R. 26):

> "He was brought up with the native Japanese tradition and educated in a family background requiring implicit obedience to his elders and the Imperial Government of the Emperor."

In other words the Court found that appellant voted because of the direction of his grandfather and uncle, having been brought up to implicitly obey his elders.

Without anything more, the Court actually decided appellant voted under coercion sufficient to render his act involuntary.

In addition to the appellant's family directing him to vote the lower court ignored the facts that the block leader was also after his family, including the appellant, to vote; that the radio, press and political speeches were out to get everybody to vote; and that ration cards, if cancelled, would imperil the appellant's survival.

Appellant was trained in implicit obedience. He had experienced brutal treatment for failure to comply. He could not with impunity disregard this pressure to vote if his survival depended on it. Under such circumstances his voting is not, and could not be, voluntary so as to cause loss of his American citizenship.

THE QUESTION OF ELECTION OF CITIZENSHIP

The appellant submits that:

1. The question of election of citizenship was not an issue in this case.

Even if it was, there is no evidence in the record to sustain the following statement in the lower Court's opinion (R. 26):

"He was educated exclusively in Japanese schools and, upon failure to obtain a sufficient mark to become an officer in the Japanese Army, served as a teacher in the official schools".

The record shows:

a. Appellant had three years of schooling in the United States.

b. Appellant did not serve in the Japanese Army nor did he apply or take examination as officer candidate for the Japanese Army. He merely took an Army physical examination (R. 49).

c. Appellant did not teach in official schools in Japan. He was a farm laborer (R. 69).

In the entered findings (R. 13) it is stated that the appellant had grown up from early childhood as a Japanese National, completely forgetful of the language, customs and ways of the land of his birth. The Court (R. 108, 109) blamed the appellant (as a minor) for getting himself educated in that situation, disregarding the fact that he had been corresponding with his immediate family, except during period of hostilities, all of whom were in the United States.

Furthermore, while the lower Court states:

"Against this background, his actions indicate a definite choice of Japanese citizenship exercised *after he had attained his majority.* American citizenship by birth cannot be lost involuntarily but it can be lost by voluntary conduct *after majority* by one who, by virtue of his residence, his

official registration, his ancestry and members of his family, is entitled to Japanese citizenship. (R. 26, 27). (Italics ours)

The Court does not cite any act, aside from the appellant's voting which it calls a "minor factor", done by the appellant which would indicate an election by the appellant of Japanese citizenship as against American citizenship.

As against the facts of this case, our Supreme Court upheld American citizenship under facts far stronger indicating election of Japanese citizenship in *Kawakita v. United States*, 343 U. S. 717, 96. L.Ed. 799, 72 S.Ct. 950 where Kawakita was held to be an American citizen and therefore chargeable with the crime of treason in spite of the uncontradicted facts that after Kawakita was over the age of twenty one, he (1) registered as a Japanese national, (2) had his name removed as an American Alien at the Japanese Police Station, (3) changed his place of residence from California to Japan, (4) went to China on a Japanese passport, (5) accepted labor draft papers from the Japanese government, (6) faced the east each morning to pay his respects to the Emperor of Japan and (7) besides mistreating American prisoners of war.

If appellant is denied his American citizenship under the theory of election, or any theory, it will re-

sult in the application of the laws of the United States in one way where it is desired to prosecute a person born in this country for treason and in another way to deny one who is accused of no wrongdoing from exercising his birthright as an American citizen. Obviously, our laws and sense of justice requires its application in the same, way, namely, to require that the election be beyond reasonable doubt *Kawakita v. United States*, supra, or that the act expatriating an American citizen be done with absolute freedom, *Mandoli v. Acheson*, Supreme Court of the United States, decided November 24, 1952, *Acheson v. Kuniyuki*, supra, and cases approved therein.

2. A natural born citizen of the United States is not required to elect between dual citizenships upon reaching majority.

Such a citizen may accept some of the incidents of derivative dual citizenship without prejudice to his American citizenship. *Kawakita v. United States*, supra *Mandoli v. Acheson*, supra, holds in part as follows:

> "If petitioner, when he became of full age in 1928, were under a statutory duty to make an election and to return to this country for permanent residence if he elected United States citizenship, that duty must result from the 1907 Act then applicable. In the light of the foregoing history, we can find no such obligation imposed

by that Act; indeed it would appear that the proposal to impose that duty was deliberately rejected."

The Nationality Act of 1940, though not controlling here, shows the consistency of congressional policy not to subject a citizen by birth to the burden and hazard of election at majority. This comprehensive revision and codification of the laws relating to citizenship and nationality was prepared at the request of Congress by the Departments of State, Justice and Labor. The State Department proposed a new provision requiring an American-born national taken during minority to the country of his other nationality to make an election and to return to the United States, if he elected American nationality, on reaching majority. The Departments of Justice and Labor were opposed and, as a consequence, it was omitted from the proposed bill. This disagreement between the Departments was called to the attention of the Congress. While in some other respects Congress enlarged the grounds for loss of nationality, it refused to require a citzen by nativity to elect between dual citizenships upon reaching a majority."

3. A native born citizen of the United States does not lose his United States citizenship by foreign residence long continued after attaining his majority.

It was so held in *Mandoli v. Acheson*, supra, involving a person born of Italian parents brought to Italy as a "suckling" who, being denied entry into the United States as an American citizen, entered this country for the first time in 1948 under a certificate

of identity for the purpose of prosecuting an action to establish his citizenship when he was about forty years of age.

Kawakita made application for registration as an American citizen with the American Consulate in Japan three years after he attained his majority and while still in Japan during said period. In his case, it was held that the presumption of expatriation in Section 402 under Sections 401(c) or (d) of the Nationality Act of 1940 was a rebuttable presumption which was overcome upon a showing that he was not expatriated under Sections 401(c) or (d) of the said Act.

CONCLUSION

The facts and circumstances of this case show that the appellant, George Takehara, is a native born citizen of the United States and did not expatriate himself by his voting in the Japanese elections of April, 1947 because his act of so voting was not his free and voluntary act.

The judgment of the District Court should be reversed, with directions for the entry of an order declaring that petitioner is a citizen of the United States.

Respectfully submitted,

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of HILE, HOOF & SHUCKLIN
Attorneys for Appellant

No. 13555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE TAKEHARA,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE JAMES ALGER FEE, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
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Attorneys for Appellee

Office and Post Office Address:
324 Federal Building
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STATUTES

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BRIEF OF APPELLEE

QUESTION PRESENTED BY THE APPEAL

The appellant while adopting in his brief (page 7) his Statement of Points as set forth on pages 30 and 31 of the Transcript of the Record, has apparently abandoned in his "Specification of Errors" (pages 7 - 10), those points previously raised as to

the national status of Japan at the time herein involved, and the constitutionality of Title 8, U.S.C.A., Sec. 801(e).

The principal question now, therefore, presented appears to be: Does the record support the District Court's grounds for denying the application herein?

(1) Because Appellant's actions show clearly that he chose Japanese citizenship after arriving at majority.

(2) Because Appellant renounced American citizenship in the manner prescribed by acts of Congress by voluntary voting at a Japanese election.

STATEMENT OF THE CASE

This cause arises under Title 8, U.S.C.A., Section 903, by reason of an action instituted by the appellant herein on June 6, 1951, in the court below, against the appellee, Dean G. Acheson, Secretary of State of the United States, in the district in which appellant claimed his permanent residence, for a judgment declaring appellant to be still a citizen of the United States.

This action followed the denial of his application made to the Vice Consul of the United States at Kobe, Japan, on February 27, 1950, for a passport as a

National of the United States; which denial was evidenced by Certificate of Loss of Nationality of the United States issued by the Vice Consul on August 11, 1950, and approved by the Department of State February 23, 1951, on the ground that appellant had expatriated himself under the provisions of Section 401(e) of Chapter IV of the Nationality Act of 1940, (Title 8, U.S.C.A. 801 (e)), by voting in the Japanese political election of April 5, 1947.

The appellant entered the United States upon the Statutory Certificate of identity provided in such cases, pursuant to Section 3(2) of the Immigration Act of 1924, (8 U.S.C.A. 903), as a temporary visitor for business for such period of time as necessary to prosecute his claim to United States citizenship, and for such time to the residence designated by the Immigration Service within the district.

After a hearing before the Court on December 20, 1951, at which the appellant testified in his own behalf through an interpreter, the District Court denied the appellant's claim on the grounds and for the reasons stated in the written opinion of the Court. (R. 23-27)

Findings of Fact and Conclusions of Law, consonant with the Court's opinion, were entered August 9, 1952, (R. 10-14), and based thereon a judg-

ment, denying appellant's complaint and dismissing his action, and allowing defendant costs in the sum of $23.00, was entered August 9, 1952. (R. 15-16).

From that final judgment appellant has brought this appeal. (R. 28-31).

PERTINENT STATUTES

Section 401 of the Nationality Act of 1940, as amended, Title 8, U.S.C.A., Section 801, provides that a national of the United States may lose his nationality in certain prescribed ways:

Such section provides in relevant part:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, * * *;
>
> or
>
> * * * * * * * * * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; * * * *."

Section 403 of said Act, Title 8, U.S.C.A., Section 803, in pertinent part provides:

> "(b) No national under eighteen years of age can expatriate himself under Subsections (b) to (g), inclusive, of Section 801."

ARGUMENT

1. Appellant's Actions Show Clearly that He Chose Japanese Citizenship After Arriving at Majority.

The District Court's findings, (R. 10-14), omitting procedural matters, and with relevant pages of record supplied, were:

I.

"That the plaintiff, George Takehara, was born at Firwood in Pierce County, Washington, United States of America, on March 13, 1926, of Japanese born parents who were nationals of Japan, and by virtue of his birth, plaintiff was a citizen of the United States, and by virtue of the nationality of his parents plaintiff was at birth a national of Japan." (R. 40, 44, 47, 83).

II.

"That at the approximate age of 4 years, the plaintiff traveled to Japan for a visit with his grandparents on a 1928 passport issued to him when he was 2 years of age, and that after some months there, returned to the United States; that thereafter in the year 1935 at the age of nine years, the plaintiff in company with his older brother, again traveled to Japan to be with his grandparents and other relatives in Japan; that the brother returned to the United States in 1939, (R. 42), and the plaintiff remained in Japan and attended school during his minority and worked on a farm." (R. 44, 45, 48).

III.

"That during World War II, the plaintiff was given a physical examination preliminary to serving in the Japanese armed forces, but did not meet the requirements of that service as to weight and height, and was rejected for that reason." (R. 48-50).

IV.

"That plaintiff shortly after attaining his majority voted in the Japanese political election of April 5, 1947, during the military occupation of Japan by the Armed Forces of the United States." (R. 53-57).

V.

"That thereafter on February 27, 1950, approximately three years after voting in said Japanese election, the plaintiff applied * * * for a passport as a national of the United States; that such application was denied * * *." (R. 64-84).

* * *

VII.

"That the evidence before the court reveals that the plaintiff in implicit obedience to his elders and without objection on his part at any time had grown up from early childhood as a Japanese national, completely forgetful of the language, customs and ways of the land of his birth, and that neither at the time of nor at any time prior to the Japanese political election on April 5, 1947, had he then or on any other occasion asserted his claim to American citizenship or objected to being treated by his elders or the authorities as a Japanese National, (R. 48, 52-53), and such being the situation and

> in view of the plaintiff's antecedents, his upbringing and schooling in the language, customs, habits and ways of Japan by those equally unobservant of anything attached or related to his becoming a National of the United States by choice, (R. 48, 59, 61), and in view of his naturalization as a Japanese National and his admitted ignorance of the effect of his voting upon his claim to American citizenship, (R. 51, 57), it must follow that the plaintiff had no reason to abstain from voting in the Japanese political election of April 5, 1947, and did so as a natural consequence of a Japanese National's interest therein, by whatever inducement, and without any relation or reference to his claim to being a national of the United States." (R. 61).

In addition to the appellant's testimony at the hearing before the District Court, appellant's application for passport on February 27, 1950, contained in the State Department's records, placed in evidence, (R. 62-63), further supports the Court's findings, wherein the question is stated: (R. 85-86).

> "Have you ever been registered as a national of Japan or any other foreign country, or obtained a passport, certificate, card or other document therefrom in which you were described as a National of a country other than the United States?"

After answering the foregoing in the affirmative, appellant made the following response to request therein for details:

"I applied for my Japanese Nationality on January 12, 1943, and the permission was granted on March 10, 1943. I established by own Family Register on May 25, 1943." (R. 86).

At the time of hearing before the Court, appellant, in answer to a question relative to the Japanese Government's refusal to accept foreign citizenship of that country's nationals, testified through his interpreter:

"Unless you are registered they treated you as a foreigner." (R. 61).

And when asked if he, appellant, did anything to refuse to accept Japanese citizenship, his answer was:

"No, I have not." (R. 61).

While stating that "the question of election of citizenship was not an issue in this case," (Appellant's Brief 17), counsel for appellant argue that the Court does not cite any act, aside from the appellant's voting, done by the appellant which would indicate an election by the appellant of Japanese citizenship as against American citizenship. (Appellant's Brief 19).

However, the District Court did not permit minor acts to obstruct the greater view of surrounding facts, and so stated:

> "The question wasn't whether he wanted to acquire Japanese citizenship, the question was whether he wanted to accept Japanese citizenship because as I understand the international features of it, the claims were made by the Empire of Japan, or the Emperor of Japan, that a Japanese born of Japanese nationals in the United States still acquired Japanese citizenship and the duty and obligation of loyalty to the Emperor. So the question is whether he intended to accept Japanese citizenship and assume its responsibilities." (R. 60).

Counsel further argue (Appellant's Brief 19) that the facts were far stronger indicating election of Japanese citizenship in *Kawakita v. United States*, 343 U. S. 717, than in the instant case.

Counsel, in their enumeration of factors indicating such election, fail to take into consideration those factors by which the Supreme Court found that Kawakita had maintained his right to a return passport, set forth at pages 720 and 721, of said reports. These disclose that Kawakita was 18 years old before he went to Japan. Certainly, it may be assumed, that he had not been reared as a Japanese national, but rather as an American citizen. With that background, it was imperative that he distinctly do some act described in the statute as effecting expatriation. He may have committed crimes against humanity and his fellowmen, but he did not commit the acts of expatriation, defined by Congress.

Appellant's case has been built upon the facts of his complete subjection to all things Japanese, from early childhood to the time of his application for a passport to return to America. (R. 93-97).

In the Court's acceptance of appellant's own version of his background, it is difficult to see how any other conclusion could have been reached by the District Court, except as stated in the latter part of its opinion:

> "Takehara lost his citizenship by his conduct of which voting is a minor factor. He was born in the United States in 1926. A passport was issued to him when he was two years old, and upon this he was taken to Japan where he remained for some months. In 1935, when nine years old, he again was taken to Japan to be with his grandparents and other relatives, and has ever since remained there until brought to this country to prosecute this case. He was brought up with the native Japanese tradition and educated in a family and social background requiring implicit obedience to his elders and the Imperial Government of the Emperor. He was educated exclusively in Japanese schools and upon failure to obtain a sufficient mark to become an officer in the Japanese Army, served as teacher in the official schools. He has no education in English or training in our form of government.
>
> "Against this background, his actions indicate a definite choice of Japanese citizenship, exercised after he had attained majority. American citizenship by birth cannot be lost involuntarily, but it can be lost by voluntary conduct after ma-

jority by one who, by virtue of his residence, his official registration, his ancestry and members of his family, is entitled to Japanese citizenship.

"The mere fact that the elders of the Japanese clan to which plaintiff belongs have now decided that he should seek to recoup this birthright which he has renounced and that he has obeyed them is of no consequence. Since responsibility is individual, as well as allegiance, it would seem impertinent that a brother of plaintiff was killed in our service during the war and that another is presently in the army.

"In this day of conflicting ideologies, the courts would be remiss if, for the purpose of indicating a lack of race prejudice, there were a deviation by rationalization from the statutes enacted by Congress for protection of the country." (R. 26-27).

Appellant's brief at pages 17 and 18 call attention to several discrepancies covering the matter of schooling and occupation referred to by the Court in its opinion.

Considering the fact that plaintiff had completely forgotten the American language and very likely whatever else of knowledge acquired in in America, the District Court might well say that "he was educated exclusively in Japanese schools," in the absence of a determination that what is forgotten is also a part of education.

To the further contentions of appellant, (Appellant's Brief, 20, 21) it is appellee's position that a

natural born citizen of the United States is not required to elect between dual citizenships upon reaching majority, but in case such citizen does elect as in the instant case, these further questions or contentions of appellant should be considered moot.

2. Appellant Renounced American Citizenship in the Manner Prescribed by Acts of Congress by Voluntary Voting at a Japanese Election.

In the Questionnaire, subsidiary to appellant's application for passport, at page 87 of the Record, the following questions asked and answers made by appellant on February 27, 1950, appear:

"C. Voting in a Foreign Country."

"1. Have you ever voted in a political election in Japan or any other foreign state or participated in an election or plebiscite to determine sovereignty over a foreign territory?

(Yes or No): Yes.

"If so, give date and place of voting and nature of each such election or plebiscite.

(Answer) April 10, 1946, Zenshoji Temple, Tannowamura, Sennar-gun, Osaka-fu, to elect Member of the House of Representatives.

(Official correction as to year of voting. (R. 74-75.)

"2. Prior to voting, did you make a claim to

citizenship of the United States to any local or national official?

(Yes or No): No.

"3. Did you request exemption from voting?

(Yes or No): No.

"4. Were you urged, advised or coerced to vote by any official or other person?

(Yes or No): No.

* * *

"6. In connection with voting, did you ever consult an American foreign service officer concerning an effort to influence you to vote?

(Yes or No): No.

"7. Give detailed statement of your reason for voting.

(Answer) Overhearing rumors that non-participants were to be punished caused me to vote and I did not know that one loses his American citizenship by voting."

It should be observed that these answers were made by appellant after he obviously knew that voting would result in his loss of American citizenship. It should also be observed that the claim of fear of loss of ration card was a later development in the present claim of duress.

A consideration of these answers and appellant's testimony were sufficient, appellee submits, to cause the District Court to express in its opinion its own reaction in these words: (R. 23).

> "A good deal of his examination indicated to the Court that he was highly evasive, if not false in his testimony. Whenever the shoe pinched, he had a ready remedy."

Counsel for appellant find consolation in the recognition by the Court in the case of *Acheson v. Kuniyuki*, 189 F. (2d), 741, of the principle of involuntary voting or voting under duress, although the Court found no application of that principle in the case before it.

The best illustration in the instant case of whether ignorance of the law or duress in voting is involved is found in counsel's argument of the case to the District Court: (R. 96).

> "Now, the plaintiff did not know that he would lose his citizenship if he voted. He did not intend to lose his American citizenship according to his testimony, and from all of the testimony in evidence here, it certainly wasn't his free, intelligent voluntary choice, *but was done under legal duress, and when plaintiff learned that such voting would endanger his American citizenship, he voted no more.*" (Emphasis ours).

Examination of pages 75-79 of the Record, particularly 75, will disclose the Japanese voting as

taking place on April 5, 20, 25 and 30, 1947. It is natural to assume that if duress existed on April 5, 1947, that it continued for the remainder of the month, at least. However, the alleged overwhelming force compelling appellant to vote melted away in the light of learning that appellant might face the unknown danger of losing American citizenship, and under the restraint of that uncertain danger he abstained from voting, notwithstanding the alleged exhortations, inducements and admonitions hitherto claimed as effective.

Accordingly, it must be contended, in view of the appellant's Japanese antecedents, his upbringing and schooling in Japan, his naturalization as a Japanese national, and in view of his admitted ignorance of the effect of his voting upon his claim to American citizenship, that it would appear that appellant had no reason at such time to abstain from voting and that he did so as a natural consequence of his upbringing and training as a Japanese national, and not by reason of any duress.

On rehearing, the United States Court of Appeals for the Ninth Circuit, in *Acheson v. Mariko Kuniyuki*, 190 F. (2d) 897, cert. den. 342 U. S. 942, without mention of the principle of involuntary voting, denied the petition for rehearing on the basis

of the ancient rule, pertinent to the facts in that case, that ignorance of the law is no excuse, whatever may be the language in which it is expressed.

See *Savorgnan v. United States*, 338 U.S. 491, 496; *Savorgnan v. United States*, 171 F. (2d) 155, 159.

Appellant's Brief, pages 10-17, cites numerous district decisions in which the courts have determined the Japanese election of 1946, the first under the occupation, was attended with such fanfare and patriotic fervor as to render it unduly coercive.

See in this connection *Shirakura v. Royall*, 89 F. Supp. 713, 715. See also *Yamamoto v. Acheson*, 93 F. Supp. 346; *Kuwahara v. Acheson*, 96 F. Supp. 38.

Of this district cases cited by appellant, it appears that the election of 1946 was the one examined by the courts and determined to be coercive and of undue influence, in all except the case of *Uyeno v. Acheson*, 96 F. Supp. 510, in which a minor who was permitted to vote, testified to inducements extremely familiar to the reported descriptions of the election of 1946.

Unless it can be assumed that the Japanese elections of 1947 must of necessity have been likewise

accompanied by all the emotion that attended the first of 1946, there is a great lack of reported decisions in the district courts to substantiate the claim in the instant case on that point.

This court has held that a person 20 years of age lost his status as a national of the United States by voting in a primary local election in Mexico after being taken to that country of his parent's origin at the tender age of 5 years.

See *Miranda v. Clark*, 180 F. (2d) 257.

Appellee fails to see grounds in the instant case for a different interpretation of the statute when applied to other nationals.

CONCLUSION

For the foregoing reasons, it must be contended the decision below should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

GUY A. B. DOVELL
Assistant United States Attorney

No. 13557

United States
Court of Appeals
for the Ninth Circuit.

ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, Copartners, Jointly and Severally, Doing Busines as Davis Furniture Co., et al.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, Copartners, Jointly and Severally, Doing Business as Davis Furniture Co., et al.,

Respondents.

Transcript of Record

Petition to Review and Petition to Enforce an Order of The National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisca Calif.—2-6-53

No. 13557

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Twentieth Region

Case No. 20-CA-250

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and

CARROLL, DAVIS & FREIDENRICH, by ROLAND C. DAVIS.

CONSOLIDATED COMPLAINT

It having been charged by Carroll, Davis & Freidenrich, by Roland C. Davis, that the individuals, corporations, and partnership enterprises whose names appear in the caption hereof, hereinafter collectively called the Respondents, have engaged in and are now engaging in certain unfair labor practices affecting commerce, as set forth in the National Labor Relations Act, as amended, 29 U.S.C.A. 141, et seq. (Supp) July 1947, herein called the Act, the General Counsel, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the National Labor Relations Board Rules and Regulations, Series 5, as amended, Section 203.15, hereby issues this Consolidated Complaint and alleges:

I.

The Respondents, and each of them, are now, and at all times material herein have been, engaged in the purchase and sale at retail, of furniture and various household appliances. Each of the Respondents owns and operates one or more retail furniture stores in San Francisco, California, and the vicinity thereof.

II.

The Respondents, together with 10 other Employers engaged in the business of buying and selling furniture and household appliances and articles at retail, through joint representatives granted written authority for that purpose, negotiated a collective bargaining contract on January 1, 1948 with Master Furniture Guild, Local 1285, affiliated with Retail

Clerks International Association, A.F.L., hereinafter called the Union, covering hours, wages, and other conditions of employment of certain employees of the Respondents and said 10 other Employers. During the year 1949, the total sales of the Respondents were in excess of $12,400,000, of which amount in excess of $100,000 represented direct shipments of furniture and various household appliances from the places of business of the Respondents located in and about the vicinity of San Francisco, California, to places located outside the State of California. During the year 1949, the total purchases by the Respondents of furniture and various household appliances which represented direct shipments from places located outside the State of California to the places of business of the Respondents located in and about the vicinity of San Francisco, California, were in excess of $4,600,000.

III.

Master Furniture Guild, Local 1285, affiliated with Retail Clerks International Association, A.F.L., is a labor organization within the meaning of Section 2(5) of the Act.

IV.

From on or about June 4, 1949 to on or about July 9, 1949, the Respondents, and each of them, locked out and refused employment to all of their respective employees because said employees, or some of them, were members and active in behalf of the Union, or because of their concerted activities or the concerted activities of other members of the Union for

the purpose of collective bargaining or other mutual aid or protection.

V.

By the acts set forth in Paragraph IV, above, each of the Respondents has discriminated and is discriminating in regard to the hire, tenure, terms and conditions of employment of its employees, thereby discouraging membership in the Union and the exercise by the employees of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

VI.

By the acts set forth in Paragraph IV, above, and by each of said acts, each of the Respondents did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in and are thereby engaging in unfair labor practices within the meaning of Section 8(a)(1).

VII.

The acts of each of the Respondents set forth in Paragraph IV, above, occurring in connection with the operations of each of the said Respondents described in Paragraphs I and II, above, respectively, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states and tend to lead and have led to labor disputes, burdening and obstructing commerce and the free flow

of commerce within the meaning of Section 8(a)(1) and (3) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, on this 27th day of November, 1950, issues this Consolidated Complaint against the Respondents named in the caption hereof, and each of them.

[Seal] /s/ GERALD A. BROWN,
Regional Director, Twentieth Region.

(General Counsel's Exhibit No. 23 admitted in evidence.)

Affidavit of Service attached.

[Title of Board and Causes.]

ANSWER FOR RESPONDENTS

Come now the Respondents above named, and each of them, and without waiving any right or rights to present appropriate motions, either jointly or severally, in the premises, answer the Consolidated Complaint on file herein, admit, deny and alleges as follows:

I.

Admit that during the year 1949, the total sales, shipments and purchases of the Respondents, when considered as a unit, amounted to the sums set forth

in paragraph II of said complaint, but deny that the individual Respondents had sales, shipments or purchases in the total amounts set forth, and in this connection allege that at least eight of said individual Respondents had sales and shipments amounting to less than the amounts determined by the National Labor Relations Board to be the measure of acceptance of jurisdiction by said Board.

II.

Deny each and every, all and singular, disjunctively and conjunctively, the allegations set forth in paragraph numbered IV of said complaint.

III.

Deny each and every, all and singular, disjunctively and conjunctively, the allegations set forth in paragraph numbered V of said complaint.

IV.

Deny each and every, all and singular, disjunctively and conjunctively, the allegations set forth in paragraph numbered VI of said complaint.

V.

Deny each and every, all and singular, disjunctively and conjunctively, the allegations set forth in paragraph numbered VII of said complaint.

VI.

Deny that the law firm of Carroll, Davis & Freidenrich, by Roland C. Davis, is authorized to file the charge or charges upon which said complaint is based.

Wherefore, Respondents, and each of them, pray that the said complaint should be dismissed against them, and each of them.

/s/ ST. SURE & MOORE,
Attorneys for Respondents.

(General Counsel's Exhibit No. 27 received in evidence.)

[Title of Board and Causes.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Mr. David Karasick, for the General Counsel.

Carroll, Davis & Freidenrich, by Mr. Roland C. Davis, of San Francisco, Calif., for the Claimants.

St. Sure & Moore, by Mr. J. Paul St. Sure and Mr. R. B. McDonough, of San Francisco, Calif., for the Respondents.

Statement of the Case

Upon charges filed by Carroll, Davis & Freidenrich, attorneys, on behalf of employees of the retail furniture merchants named in the caption herein, a consolidated complaint was issued against the said merchants, herein collectively referred to as the Respondents, alleging that the Respondents engaged in unfair labor practices affecting commerce within the meaning of Section 8(a) (3) and (1) and Section 2 (6) and (7) of the National Labor Relations Act, (61 Stat. 136) herein called the Act. Copies of the charges, order for consolidation, complaint, and notice of hearing were duly served upon each of the

Respondents and upon the attorneys for the charging parties, herein collectively referred to as the Claimants.

With respect to the unfair labor practices the consolidated complaint alleges that the Respondents and each of them, from about June 4 to July 9, 1949, "locked out and refused employment" to their respective employees because said employees, or some of them, were members and active in behalf of Master Furniture Guild, Local 1285, affiliated with Retail Clerks International Association, AFL (herein called the Union), or because of their concerted activities or the concerted activities of other members of the Union for the purpose of collective bargaining or other mutual aid or protection.

The Respondents collectively filed an answer denying the commission of the unfair labor practices set forth in the complaint and alleging that the "sales" and "shipments" of "at least eight" of the individual Respondents amounted to "less than the amounts determined by the National Labor Relations Board to be the measure of acceptance of jurisdiction by the Board."

The hearing was held at San Francisco, California, on December 18 and 19, 1950, before J. J. Fitzpatrick, the undersigned, duly designated Trial Examiner. The General Counsel, the Respondents, and the Claimants were represented by counsel.[1] All par-

[1] At the opening of the hearing, J. Paul St. Sure, attorney for the Respondents, was granted leave to intervene on behalf of certain other San Francisco retail establishments who, together with the Respond-

ticipated and were granted full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Before any testimony was taken, Attorney St. Sure moved that the complaint be amended so as to allege that the bargaining unit consisted of the grouped employers and that the group, rather than the individual respondents committed the alleged unfair labor practices. This motion was denied as was the further motion of St. Sure to sever the complaint. At the conclusion of the hearing the parties waived oral argument but requested and were granted leave to file briefs after the close of the hearing. The San Francisco Employers' Council also requested and was granted leave to file a brief amicus curiae. Briefs have since been received from attorneys for the Respondents, the Claimants, and the San Francisco Employers' Council.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondents

The Respondents, together with 10 other employers engaged in the business of buying and selling furniture and household appliances at retail in the San Francisco, California, area, through authorized joint representatives, negotiated a collective bargaining contract on January 1, 1948, with the Union. During the year 1949, the total sales of the Respondents were

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ents named in the complaint, participated in the collective bargaining negotiations hereafter referred to.

in excess of $12,400,000, of which an amount in excess of $100,000, represented direct shipments of furniture and various household appliances from the places of business of the Respondents located in and about the city of San Francisco, California, to places outside the State of California. During the same year, the total purchases by the Respondents of furniture and household appliances which represented direct shipments from places outside California to places of business of the Respondents in and about San Francisco were in excess of $4,600,000.[2]

I find, contrary to the contention in the answers, that the Respondents are engaged in commerce within the meaning of the Act.[3]

II. The organization involved

Master Furniture Guild Local 1285, affiliated with Retail Clerks International Association, AFL, herein called the Union, is a labor organization within the meaning of the Act.

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[2] The Respondents' consolidated answer admitted the truth of allegations in the complaint as to the Respondents' business operations and Respondents stipulated that findings could be based thereon.

[3] Although the answer suggests that certain of the individual respondent's operations are so small that the Board normally would not assert jurisdiction against such respondents considered as an entity, the Respondents did not press the point or offer evidence in support thereof. The above findings are on the stipulation and the admitted fact that all the Respondents were dealing as a group or unit with the Union. The Everett Automotive Jobbers Association, et al., 81 NLRB 304; Bunker Hill & Sullivan Mining & Concentrating Company, et al., 89 NLRB No. 8.

III. The unfair labor practices

A. Background: Sequence of events.

All eleven respondents herein, together with about 54 other retail furniture dealers in the San Francisco area, belong to a rather loosely formed organization known as the Retail Furniture Association of California, which has a total membership of about 400 furniture dealers throughout the State. Since 1937 the Union has bargained, usually annually, on a group basis with a number of the San Francisco area membership, the number depending on individual authorizations issued by the dealers to the Association. These authorizations ranged from 14 to 21, but never included all the San Francisco members. When the bargaining was completed, a contract with the Union was executed by the authorized agent or agents "for and on behalf of the employers named therein."

Such a contract was negotiated and signed in 1948 on behalf of 21 retailers in the San Francisco area (herein called the Companies), including the 11 Respondents named herein. The contract was effective for one year from January 1, 1948, but automatically renewed unless 60 days' notice was given prior to the termination date of a desire to change it.

About October 20, 1948, the Union proposed a series of amendments, including increased wage rates, and requested negotiations thereon. Pursuant to this request conferences were held, beginning on December 3 and up to and including February 27, 1949, between the union negotiating committee, and Ralph H. Brown, and J. Paul St. Sure, Association representa-

tives duly designated by the Companies. During these meetings the Companies submitted a counterproposal offering, inter alia, a wage increase of 5 cents an hour. The conferees agreed to extend the term of the 1948 contract for 45 days to February 15, 1949,[4] and make any amendments agreed to retroactive to January 1, 1949. Although the area of difference appeared to be only on the question of a wage increase the negotiators adjourned after the February 25 meeting without any agreement and with no arrangement for a subsequent meeting (as has been the practice at previous conferences) when the Companies announced there would be no wage increases beyond their original counterproposal of 5 cents an hour.

In early March the Union requested strike authorization against the Companies. Instead of granting strike sanction, however, the San Francisco Labor Council caused the conferees to resume negotiations before George W. Johns, assistant secretary of the Council. Two meetings with Johns resulted on a general agreement on all matters except wages. The union committee insisted that 5 cents an hour increase was inadequate for the lower paid employees and suggested that the Union Furniture Company which had most of its employees in the lower brackets, was holding up the negotiations, but the companies refused to change their position as to wages.

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[4] The contract was later further extended first to March 10, then through April 10, 1941. Prior to April 10 it was agreed by the conferees orally that the contract terms would remain in effect so long as the "negotiations continued."

After the conclusion of two meetings before Johns, the Union prepared a job reclassification of employees which it submitted to the Companies. On May 13, the latters' representatives turned down the reclassification proposal and stated that the 5 cents an hour increase would have to be accepted by June 1, 1949, or it would be withdrawn. The union representatives announced that such an attitude on the part of the Companies might result in a strike, probably against the Union Furniture Company. St. Sure replied that if such action was taken against Union Furniture Company the other Companies would close.

Following written confirmation of the Companies' position, another conference, apparently sponsored by Johns of the Council and also attended by a Mr. Vail, representing the International Union, was held on May 26. Johns suggested arbitration of the wage differences. The Union agreed to arbitrate but the Companies rejected the proposal. Johns made another attempt to get the parties to agree on June 3. At that time St. Sure changed the Companies' offer from 5 cents an hour increase to $10 a month.[5] The Union rejected the offer and announced that Union Furniture Company would probably be struck the next day.

About 7:30 a.m. on June 4, the Union placed pickets at the warehouse and two stores of Union Furniture Company. None of the union employees of that com-

[5] The difference between the 5 cents an hour increase and the $10 a month would have meant about $1.50 additional each month per employee.

pany reported for work thereafter until the strike was settled on July 7. No employees of the other companies struck. Nor was there any attempt to boycott the other companies. However, when the employees of the Respondents herein reported for work on the morning of June 4, they were notified by their respective employers, by phamphlets or letters, that the store was closed. The notice handed to the employees *or* Sterling Furniture Company is identical to that sent out to most of the companies, excepting Redlick, and reads as follows:

To Our Employees: June 3, 1949

Since 1937 the furniture stores listed below have had a master collective bargaining contract with Retail Clerks Local Union No. 1285 AFL. Annual negotiations for modification of the agreement have been in progress for more than six months. The final offer of the employers was to increase contract salaries $10.00 per month in all classifications (salespeople and office employees). The union's final demand was for increases ranging from $16.00 to $38.00 per month.

The union has determined to strike to enforce its demands. Consequently, the following listed stores will be closed until further notice due to strike action of Clerks Local No. 1285:

Davis Furniture Company, Doyle Furniture Company, Lachman Brothers, Milwaukee Furniture Co., Mission Carpet & Furniture, Frank Newman Co., Redlick's Furniture, Shaffs Furniture Co., San Francisco Furniture Co., Sterling Furniture Co.,

Union Furniture Co., Waxman Furniture Co., J. H. Wylie Furniture.

The Management,
Sterling Furniture Company.

A similar notice was sent to the employees of Redlick,[6] wherein it was stated "in our view a strike against any one of the group is a strike against all" in the bargaining group.

Waxman Furniture Company was included in the list of stores that were to close apparently through error. Actually, Waxman remained open from June 4 through July 9, as did also eight other retailers who had participated in the negotiations as above set forth. On June 4, the Respondents, inserted the following advertisements in local newspapers:

To the Residents of the San Francisco Bay Area:

Since 1937 the furniture stores listed below have had a master collective bargaining contract with Retail Clerks Local Union No. 1285 AFL. Annual negotiations for modification of the agreement have been in progress for more than six months.

The final offer of the employers was to increase salaries $10.00 per month in all classifications (salespeople and office employees). The union's final demand was for increases ranging from $16.00 to $38.00 per month.

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[6] Apparently, the same concern which appears as Respondent, Redlick-Newman Co., in the caption of the complaint.

The union has determined to strike to enforce its demands. Consequently, the following listed stores will be closed until further notice due to the strike action of Clerks Local No. 1285.

We regret that our customers may be inconvenienced and will give notice of reopening as soon as a fair and reasonable basis for operation is achieved.

On June 9, 1949, the attorneys for the Claimants wrote each Respondent by registered mail as follows:

As you have known since Saturday, June 4, 1949, your employees who are members of Master Furniture Guild No. 1285 and covered by the collective bargaining contract of January 1, 1948, between your firm and the Guild, have been ready, willing and able to continue their employment with you.

This communication is to advise you officially that these employees remain continuously available for such employment and application is hereby made on their behalf for immediate reinstatement on their jobs.

If you do not intend to accept this application, please advise the undersigned of your reasons.

This application for reinstatement should be considered as continuously on file with you and will be immediately fulfilled by any or all of the employees for whom it is made upon notification by you directly to the employees or to the Master Furniture Guild or the undersigned.

St. Sure, on behalf of the Respondents, replied to this letter on June 13, 1949, as follows:

The members of the San Francisco Furniture Store group who are represented by this office in negotiations for a renewal of the master contract with Retail Clerks Local No. 1285 have forwarded to me your letters of June 9, 1949, requesting reemployment of members of that local.

As your letter states, the employees are those covered by the collective bargaining contract of January 1, 1948, which was executed by Ralph A. Brown as a master contract and by Jack Sparlin on the same basis. Since negotiations for renewal have been carried on, at the special request of the union, on the basis of the group unit, and since the union made no separate demands on Union Furniture Company prior to the strike, we regard the strike as one against all of the employers. We have so notified the individual employees concerned.

On June 16, the Union, through its Secretary, Jack H. Sparlin, sent the Union Furniture Company the following letter:

It has come to our attention through reports from our members and from a communication from your attorney to our attorney, that you have taken the position that you were not aware of the proposals of the Union for settlement of our strike against your company. Apparently some point is made by you of the fact that you had not been served directly with these proposals. We had been led to believe that you

were made fully aware of all of the events occurring in the negotiations by your attorney, but is such has not been the case and you in fact desire to be served directly with the proposed agreement, the terms of which were given to your attorney prior to the strike, we are happy at this time to accommodate you in this respect.

There is herewith enclosed a copy of a proposed agreement between your firm only and our Union which, if and when executed, will provide the basis for immediate termination of the strike now in progress against your firm.[7]

Strike bulletins issued by the Union during the period from June 4 to July 9, stated that the strike against Union Furniture Company was due to the failure of the negotiations with the groups of employers and that the closing of the stores of each of the Respondents constituted a lockout against its employees. On July 7, the wage dispute with the Union was settled, the strike against Union Furniture Company was called off and the employees engaged therein had returned to work by July 9. The settlement was embodied in a new contract which was formally executed in August 1949, effective as of January 1, 1949, and current at the time of the hearing.[8] On or about July 9 the Respondents resumed operations and their employees were returned to work.

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[7] The inclosed agreements contained the same terms as the Union had submitted to the Companies prior to the strike.

[8] All the Respondents, and Union Furniture, through their representatives executed the contract.

The General Counsel contends that the action of the Respondents, and each of them, in closing their respective places of business from June 4 to July 9, 1949, constituted a discriminatory lockout of their employees. It is the Respondents' position as stated in their brief that the Union "declared war" on the employers group with which it was engaged in collective bargaining by striking one of them and that as a consequence the Respondents merely treated all employees as strikers until the bargaining was settled by a master contract.

B. Conclusion.

The General Counsel and the Claimants cite Morand Brothers Beverage Company, et al., 91 NLRB No. 58, decided by the Board in September 1950, as decisive of the issues herein. The respondents, as well as the Employers Council, which as above found filed a brief as amicus curiae, also refer to Morand, but contend that the facts herein are not on all fours with that decision. In the Morand case the Board found that the discharge of all salesmen employed by members of a liquor dealers association because the union called a strike against one member thereof following an impasse in association-wide bargaining negotiations constituted a violation of Section 8 (a) (3) of the Act.

It is quite true as the Respondents point out, that there are factual differences in the two cases. In Morand the Board found that the employees were discharged, where as here the employees of the Respondent were laid off. I do not regard it as control-

ling, or even significant, on an issue of discriminatory treatment that the facts disclose a temporary layoff and not an outright discharge. Of course a temporary layoff is not as serious a matter to the employees involved as an outright discharge would be, but whether the separation from employment is permanent or temporary is a matter of degree. In either event the employees have been, during the period, deprived of their means of livelihood. The real question is why were they not working.

The Respondents also argue that in Morand the union sought to eliminate group bargaining by negotiating with individual employers and striking one of them, thus attempting to coerce the employers in the selection of their bargaining representative; but in the instant case no separate negotiations were sought nor was any attempt made to interfere with the employers' selection of a representative. However, in the Morand decision the Board did not find that the union coerced the employers in the selection or retention of their bargaining representative. Furthermore, in that case the Board clearly indicated that it did not regard separate negotiation efforts of the union as materially affecting the fundamental bargaining position of the parties when it said:

We are unable, on this record, to agree that the Local in this case sought to, or did, coerce any of the Respondents to resign from their Associations or to revoke their designations of the Associations as their bargaining agents. The action of the Local in seeking to bargain on a single-employer basis was not inconsistent with retention by the Respondents of their

membership in their Associations nor, indeed, with the resumption of association-wide bargaining at an appropriate time. As we have already pointed out, the Local was not concerned with the Respondents' membership in the Associations, it was interested only in executing a satisfactory contract.

That no separate negotiations were held or attempted, in the instant case strengthens rather than weakens the applicability of the Morand doctrine.[9] Reduced to the bare essentials the Respondents seek immunity for locking out their employees because Union Furniture, engaged with them in joint bargaining with the Union, was struck after the negotiations reached impasse. In other words, Respondents say that, Union Furniture employees having struck, all other employers in the bargaining group had the

[9] The Respondents claim that the extension agreement had not expired on June 4 when Union Furniture was struck. As previously found, the old contract was in effect so long as negotiations continued. May 13 the Companies announced that their wage increase offer of 5 cents an hour would have to be accepted by June 1 or it would be withdrawn. The Union had reiterated almost from the start of the negotiations that the 5 cents increase was inadequate and not acceptable; so on May 13 it told the Companies' representative that Union Furniture probably would be struck. It is true that after the June 1 deadline the Companies renewed their previous wage increase and in fact increased the offer slightly; but the renewed offer was promptly rejected and the Companies informed that the Union Furniture strike would start the next day. It is found that the negotiations had stalemated by June 3.

right to close their respective plants to their employees as constructive strikers. As stated by the Board in Morand, "To hold that employees in a multiemployer unit who remain at work may be treated as strikers, solely because of a strike by other employees", would inject a new and unwarranted "concept in labor relations." The Board's holding, previous to Morand, that an employer cannot engage in conduct proscribed by the Act in order to prevent a strike, even though there is economic justification for such conduct has met with judicial approval.[10] Certainly withholding employment from employees comes well within the proscription.[11]

I find, therefore, in line with the Morand decision above referred to, that the Respondents, and each of them, by closing their plants to their employees on June 4 to July 9, 1949, have interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 and in violation of Section 8 (a) (3) and (1) of the Act.

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[10] Star Publishing Company, 97 F. 2d 465; Fred P. Weissman, 170 F. 2d 952, cert. den. 336 U. S. 972.

[11] Respondents do not contend that their employees were locked out because the Respondents found it unprofitable to operate while Union Furniture was being struck. It is also noted that all the employers included in the bargaining group (referred to herein as the Companies) did not withhold employment, or close their plant while Union Furniture was being struck.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents, and each of them, set forth in Section III, above, occurring in connection with the operations of the Respondents and set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondents have engaged in certain unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondents discriminated in regard to the tenure of employment of their employees by locking them out from June 4 to July 9, 1949. Although each of these employees has been reinstated, he is entitled to reimbursement for working time lost as a result of the discriminatory action. It will therefore be recommended that each of the Respondents make whole each of its employees for any loss of pay or commission he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned in such position from the date of discrimination against him to the date of his reinstatement, less his net earnings during the

said period.[12] Each Respondent to make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of back pay due.[13]

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Master Furniture Guild, Local 1285, affiliated with Retail Clerks International Association, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. The Respondents, and each of them, by discriminating in regard to the tenure of employment of its employees, thereby discouraging membership in Master Guild, Local 1285, affiliated with Retail Clerks International Association, AFL, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondents, and each of them, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

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[12] Crossett Lumber Co., 8 NLRB 440; Republic Steel Company, 311 U.S. 7.

[13] F. W. Woolworth Company, 90 NLRB No. 41.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record made herein, I recommend that each of the Respondents herein, namely Albert Leonard, Arnold Davis, Sidney Davis and William Gitzes, co-partners, jointly and severally, d/b/a Davis Furniture Co., Doyle Furniture Co., Inc., a corporation, Lachman Bros., a corporation, Harry Frank, an individual, d/b/a Milwaukee Furniture Company, A. Eugene Pagano and M. de Castro, co-partners, jointly and severally, d/b/a Mission Carpet and Furniture Co., Frank Newman Co., a corporation, Redlick-Newman Co., a corporation, Shaff's Furniture Co., a corporation, Joseph H. Spiegelman and Leon Speigelman, co-partners, jointly and severally, d/b/a San Franciso Furniture Co., Sterling Furniture Company, a corporation, James F. Wiley and Verna M. Gardner, co-partners, jointly and severally, d/b/a J. H. Wiley The Furniture Man, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Master Furniture Guild, Local 1285, affiliated with Retail Clerks International Association, AFL, or in any other labor organization of its employees, by locking them out or otherwise discriminating in regard to their tenure of employment or any term or condition of employment.

(b) In any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to

join or assist Master Furniture Guild, Local 1285, affiliated with Retail Clerks International Association, AFL, or any other labor organization to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or mutual aid or protection, or to refrain from any or all such activities, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Make whole each of its employees for the discrimination against him in the manner set forth in the section here entitled "The remedy."

(b) Post at its places of business in the San Francisco area, copies of the notice attached hereto marked Appendix. Copies of said notice to be furnished each Respondent by the Regional Director for the Twentieth Region (San Francisco, California), shall, after being signed by an appropriate representative of the Respondent, be posted by said Respondent immediately thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Twentieth Region in writing within twenty (20) days of receipt of this Intermediate Report and Recommended Order what steps it has taken to comply herewith.

It is further recommended that unless each Respondent shall so notify the Regional Director that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring each Respondent failing to comply with such recommendations, to take the action aforesaid.

Dated at Washington, D. C., this 16th day of February, 1951.

/s/ J. J. FITZPATRICK,
Trial Examiner.

APPENDIX

Notice to All Employees Pursuant to the Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not in any matter interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Master Furniture Guild, Local 1285, affiliated with Retail Clerks International Association, AFL, or any other labor organization to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

We Will make whole each of our employees for

any loss of pay suffered as a result of the discrimination against him, etc.

All our employees are free to become or remain members of the above-named union or any other labor organization.

Dated.....

.....

(Employer)

By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Causes.]

EXCEPTIONS TO THE INTERMEDIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER

Respondents and Intervenor, and each of them, hereby except to the Intermediate Report and Recommended Order of the Trial Examiner herein, as follows:

Exception Number 1

The finding contained in footnote 1 on page 2 is inaccurate in that it states that the intervention was limited to "certain other retail establishments."

The facts are that the motion to intervene was "on behalf of the unit which is comprised of stores that authorized the negotiators * * * to represent them,

and that would include at the outset of negotiations some additional stores alleged in your complaint other than those specifically named in this charge". (Trans. p. 25). Further, the motion to intervene was made "without limitation" for "this group of stores as the bargaining unit which undertook discussions for the negotiation of the contract, the contract which is here concerned". (Trans. p. 30). And the intervention was granted on this basis.

It is true that the transcript, as to some phases of the discussion on this point, is garbled and confusing. The reporting method used was the newly adopted "dictating system", and in addition to its inaccuracy, the dictating machine failed to function at several stages of the hearing. However, the ultimate facts can be deciphered by careful reading and some use of imagination.

The General Counsel agreed that the Complaint, though in the form of a consolidated complaint against individual Respondents, was being prosecuted on the theory "that commerce is to be predicated upon the business operations of all of the employers within this group who are acting collectively at the time". (Trans. p. 15). He further stated (Trans. p. 14): "The fact is, as counsel states, and upon which there is no disagreement, that the separate respondents together constituted a single appropriate unit for the purposes of collective bargaining * * * and that they acted as a group, and that they are responsible both individually and collectively for such action as alleged in the complaint."

The distinction between the intervention as to "cer-

tain other retail establishments'' and as to a ''single appropriate unit'' comprised of ''all the employers within this group who are acting collectively at the time'' has an important bearing on the entire theory of this case, and specifically forms the basis for Exception Number 2.

Exception Number 2

The Trial Examiner erred in denying Intervenor's motion ''that the complaint be so amended as to allege that the bargaining unit consisted of the grouped employers, and that the group, rather than the individual respondents committed the alleged unfair labor practices.'' (11. 49-51 p. 2).

The matter of avoiding individual liability by substituting the group unit was never in issue. Indeed, the very opposite appears. (Trans. pp. 23-24). Again, the transcript is somewhat garbled, but the ultimate facts can be discovered.

The motion to amend, made in behalf of the Intervenor, was coupled with a motion in behalf of the individual respondents to sever. (Trans. p. 31). If the motion to amend were to be denied and the complaint prosecuted on the theory that the named individual respondents were acting as individuals, and not as a bargaining unit, then General Counsel should have been required to present proof of jurisdiction for commerce purposes as to the individual respondents.

Under ordinary circumstances these motions might appear to be mere legalistic footwork. In the instant case, however, they point up the very inconsistency

of the theory upon which the complaint is prosecuted. In the light of the ultimate conclusions of the Trial Examiner, this is what happens:

1. General Counsel contends that charges against individual respondents have not been consolidated for the "purposes of jurisdiction alone". (Trans. pp. 14-15). He further states that the consolidation was ordered because the group did not "constitute a formal association as such". (Trans. p. 16). But he insists that the group "together constituted a single appropriate unit for purposes of collective bargaining". (Trans. p. 14). The lack of a "formal association as such" is immaterial to the constitution of an appropriate unit. See Avondale Dairy Co. No. 9-UA-1496.

2. The Trial Examiner grants the motion of the bargaining unit to intervene. (Trans. p. 30).

3. The Trial Examiner denies the motion to amend the complaint to direct the charges against the bargaining unit, rather than the individual employers (Trans. p. 31).

4. The Trial Examiner denies the alternative motion to sever, thus ruling that commerce figures may be "lumped" on the unit basis, without requiring proof that any individual respondent affects commerce within the regulations of the Board. (Trans. p. 32).

5. The Trial Examiner concludes that an appropriate unit of employers although jointly prosecuted, although grouped for purposes of commerce, although bargained with for a "master contract" before, during and after a strike, although never challenged

by the Union on the basis of individual bargaining, although struck at one point for the purpose of having and continuing a master contract, nevertheless may not act in concert to resist union demands if the union elects to strike one member of the group for the purpose of endeavoring to enforce a demand for a group contract with the employers then in negotiation.

Exception Number 3

The finding that the Respondents "are engaged in commerce within the meaning of the Act" is erroneous in the light of the denial of the motions to amend or sever.

Footnotes number 2 and 3 on page 3 of the Intermediate Report further point up the error in the reasoning of the Trial Examiner. He relies upon a stipulation as the validity of the "lumped" figures as to volume of business as if it constituted a waiver of Respondents' and Intervenor's positions. He then asserts that "no evidence was offered in support" of the allegation in the answer denying commerce. The theory that Respondents constituted an appropriate unit having been urged by General Counsel and having been adopted by the Trial Examiner, despite the denial of the motion to amend, there was no reason for Respondents to offer proof in contravention of their own claim that the complaint should run against the group. And if any proof of commerce data for the purposes of establishing jurisdiction were to be presented, the burden of presenting such proof rested with the General Counsel.

Exception Number 4

The findings of the Trial Examiner beginning on line 25 of page 4 of the Intermediate Report purporting to describe the procedure followed by the Union to obtain strike sanction, as well as the Trial Examiner's repeated references to "the strike against Union Furniture Company", are inaccurate and erroneous.

Among the basic questions in this case are those relating to how and why the strike was called.

The charging party, in his brief filed with the Trial Examiner, contends that the decision to strike "was not merely a matter of strategy or convenience, an isolated tactic in the large strategy of war". (Charging Party's Brief, bottom of page 4 and top of page 5.)

The record establishes the opposite. And the sole witness who testified concerning the nature of the strike was the man best qualified to describe it—Business Agent Sparlin. After testifying concerning an earlier Union vote "for strike sanction against the stores, the group of stores, that were represented by Mr. St. Sure at that time" (Trans. p. 142) he has this to say about the second strike vote:

"At that time we reported back to the union membership and at that time we could see that we weren't getting settlement, and discussed the problems thoroughly with the membership—the negotiating committee and the executive board asked at that time for permission to call a strike against any one or all of the stores as they saw fit. During their discussions and so forth, the negotiating committee and the ex-

ecutive board and different members told the membership at that time that there was a problem we felt the Union Furniture Company was holding out, and we wanted permission to strike any one or all of them because we felt at that time we didn't want our hands tied, if there was to be a strike we were pretty sure it would be the Union Furniture Company.

Q. "But you specifically asked your membership for authority to leave in the hands of the executive board or the negotiating committee the right to determine whether there should be a strike against all the stores or one, and that one could be the Union or it could be some other company, is that correct?

A. "Could have been.

Q. "And you asked that authority for strategic reasons, in order to accomplish your purpose of securing the master contract, is that correct?

A. "Well, that is right.

Q. "Pardon me?

A. "That is right." (Trans. pp. 143, 144).

And on the evening before the strike began, the decision to strike and the authority for calling it are described by Mr. Sparlin as follows:

Q. "At that time had your committee delegated to the Central Labor Council the authority to determine what and how the strike should be called?

A. "We hadn't delegated them anything, no.

Q. "Did you discuss with Mr. George Johns, who is the so-called sub committee from the Labor Council, to assist in these negotiations, what strategy should be used in striking one or all of the stores?

A. "Oh, yes.

Q. "And did you and Mr. Johns reach a conclusion that you would strike one of the stores only for the purpose of endeavoring to secure a master contract from the group?

A. "Well, our committee decided who they would request to strike against. It was their determination that the Union Furniture Company be struck.

Q. "It was the determination of your committee and yourself and Mr. Johns, was it not, to call a strike against Union Furniture Company for the purpose of endeavoring to enforce your demand for a group contract to include Union and other furniture companies that were then in negotiation, isn't that correct?

A. "I believe it was." (Trans. pp. 146, 147).

Not only does Business Agent Sparlin, the only witness called by the Charging Party, describe the strike action as a matter of strategy, but his testimony is replete with declarations as to why it was called. Here are a few examples:

On page 131 of the transcript Mr. Sparlin states that it was not the intention of the Union to try to get a separate contract with Union Furniture Company.

On page 132 he declares that the Union did not want to bargain with any employer separately.

On the same page he declares that the purpose of the strike was to require Union Furniture Company to sign the group contract, and that the Union wanted the contract in the form of a master contract.

On page 141 he states that he never changed his

view that all issues were to be settled on a group basis as distinguished from individual stores.

On page 145 he states that after the strike was called the Union continued to press its demands against the entire group and not against Union Furniture Company alone.

On page 160 he declares that the strike was for the purpose of having Union Furniture Company sign the master agreement.

On page 166 he states that the Union never had any other intention than to secure a master contract, and similar statements appear on pages 167 and 168.

It is difficult to understand, on the basis of this record, how the charging party could reach the conclusion stated in his brief, to the effect that the strike against Union Furniture Company was "not merely a matter of strategy or convenience". It is even more difficult to understand how the Trial Examiner failed to distinguish the instant situation from that present in the Morand Bros. case.

Certainly it is crystal clear that the "why" of this strike was to secure a group contract, and the "how" was to adopt "an isolated tactic in the large strategy of war".

Exception Number 5

The finding contained in footnote 7 on page 7 of the Intermediate Report, while literally true, does not indicate that the agreement presented was in fact the "master contract".

On this subject, the record is likewise explicit.

Mr. Sparling was questioned concerning the nature of the agreement sent to Union Furniture Com-

pany for execution after the strike was in progress, and the following answers appear on pages 159 and 160 of the transcript:

Q. "Now I will show you General Counsel's Exhibit 46, which is a supplemental agreement sent to the Union Furniture Company some days after the strike was called, and I notice that the witness on the supplemental agreement refers to 'the agreement between the parties effective January 1, 1948, is hereby extended and renewed until August 1, 1950 with the following amendments'. What was the contract of January 1, 1948 that you were referring to?

A. "Well, that was the agreement that was then in effect, that the amendments were being made on.

Q. "In other words, the master agreement?

A. "Yes.

Q. "And you were then asking that the Union Furniture Company after the strike reexecute or to modify the master agreement?

A. "Well that's correct, along with the others.

Q. "Along with the others? A. "Right.

Q. "Then your strike against the Union Furniture Company even after the strike was called was for the purpose of having Union Furniture sign the master agreement, is that correct?

A. "That's correct."

Beyond this, an examination of the document itself (G. C. Exhibit 46) demonstrates that despite the reference in the accompanying letter to "your firm only", the form of agreement submitted related to the multi-employer unit, contained provisions for "asso-

ciation action", and, in fact, purported to be a "modification" of the agreement of 1948.

Exception Number 6

The finding that although the facts disclose a "temporary lay off and not an outright discharge", nevertheless such facts are "not controlling, or even significant", is erroneous, in the light of the record herein.

In connection with this finding, the Trial Examiner states that "the real question is why they were not working". But he makes no attempt to answer this question, except by assuming that the treatment of the employees was discriminatory.

The plain facts in this case are that the Union intended at all times to strike for a group contract and that it adopted a policy of striking any one or all of the stores as a matter of strategy to achieve this objective. To reason that, under such circumstances, members of the employer group must await patiently the total development of such strategy, to the extent of continuing employment to members of the Union who are engaged in the common enterprise, is to bring about an even more incongruous result than that envisioned by the Board majority in the Morand case.

Indeed, if the Morand doctrine is to be extended to cover situations of the kind established here, wherein no question of discharge and no question of bargaining unit is involved, then it must follow that a Union may strike a part of a plant, or a single department, or an individual establishment among several oper-

ated by a single employer and the employer may not treat other union members in the unit remaining on the job as strikers. Or to pursue this "logic" to the point of complete incongruity—a Union might strike the "meter reading department" of a gas and electric company (as once was threatened in California), and at the same time contend that all other members of the same Union should be continued on their jobs or be discriminated against if laid off, even though all the jobs were in a single bargaining unit.

The policy of the Act is to minimize industrial strife, but it is not to give Unions a hunting license to select the time and place for the application of economic pressure without regard to the unit concerned and the objectives to be achieved. The maximum protection that should be accorded is that they be regarded as strikers if they act in concert to win a strike, and that they be protected against discharge during the pendency of the strike.

In the Morand case the Board majority had the following to say:

"To hold that employees in a multiemployer unit who remain at work may be treated as strikers, solely because of a strike by other employees, would involve the introduction of a new concept in labor relations—i.e., the vicarious or contructive strike. We know of no legislative or other warrant for introducing such a concept." (Emphasis added.)

Here the Union and the Employers alike regarded and still regard the multi employer unit as the only appropriate unit. True, some other unit could have been established. But this would be equally true of

a single plant and a single employer. Less than total bargaining units can be established for departments within a factory. Does it follow then that the employees who remain at work in a single plant, within a single unit, with a common objective (to win a wage increase for the entire plant) may not be considered strikers, whether vicarious, constructive or regular, when a portion of their brothers and sisters walk off the job as a matter of "strategy"?

It is submitted that the Morand doctrine, if valid cannot apply to the instant case. The employees who remained at work were not treated as strikers "solely because of a strike by other employees"—but rather because of the nature of the strike, the objective of the Union, and the strategic plan adopted by the Union to achieve that objective—a group contract.

Exception Number 7

The finding of the Trial Examiner "that no separate negotiations were held or attempted in the instant case strengthens rather than weakens the applicability of the Morand doctrine" is erroneous.

Here again, it appears that the Trial Examiner fails to grasp the obvious distinction between the instant case and the Morand case. The very essence of the quotation on which he relies in support of this finding on page 8 of his report is the following statement by the Board majority:

"The action of the local in seeking to bargain on a single-employer basis was not inconsistent with retention by Respondents of their membership in their membership in their Association nor, indeed, with

the resumption of association wide bargaining at an appropriate time." (Emphasis added.)

But in the instant case no one contends or suggests that the Union took any action seeking to bargain on a single employer basis. The Union expressly denied it. And the Trial Examiner finds that it was not attempted.

Further, in the Morand opinion, the majority quotes with approval an excerpt from the brief of General Counsel stating:

"It would set a sweeping precedent for the conversion of any single employer's dispute into an association-wide or industry-wide dispute. An isolated skirmish would become a civil war." (Emphasis added.)

But here there was no "single employer's dispute". Nor was there any "isolated skirmish". The record in this case will not permit of any such interpretation.

And in considering the Respondents' contention about coercion in the Morand case (no similar contention is made by Respondents herein), the Board majority again and again indicated its view that the Morand case turned upon the questions of discharge and separate negotiations. Here are a few examples relating to separate negotiations:

"As the local's proposal to Old Rose related only to separate negotiations * * *"

"* * * the local had no alternative but to propose separate negotiations * * *"

"* * * The local's invitation to Frank to meet with it in separate negotiations* * *"

"As already stated, there is no basis in the record for finding that these proposals for separate negotiations precluded the conduct of such negotiations by the representatives of the Associations."

"Balancing the instability resulting from the collapse of negotiations on a multiemployer basis against the benefits to be derived from further collective bargaining on a single employer basis, we conclude that, in this case, to ensure the fullest freedom in exercising the collective bargaining rights guaranteed to employees single employer units could be found appropriate."

"Here however, there was no attempt by the local to substitute unilateral action or individual bargaining for collective bargaining, but only to substitute for one type of collective bargaining (association-wide) another type of collective bargaining (on a single employer basis)."

Whatever may have been the situation in the Morand case, the short answer to this issue in the instant case is found in the categorical testimony of Mr. Sparlin on page 132 of the transcript, as follows:

Q. "Did you want to bargain with any employer separately, or on a separate basis?

A. "No, we didn't."

Certainly, on the basis of this record, the Morand doctrine which "would give to unions a limited al-

ternative choice as to bargaining units" for the purpose of reducing "to that extent the existing disparity between the treatment accorded employers and unions" cannot be applicable, since the Union did not desire, or seek or attempt to exercise this choice. And since the Board majority urges in the Morand case that the same principles be applied to unions as to employers in connection with the selection or shaping of a unit, we urge that in the instant case the Union and the Employers alike are now, and, at all times in issue, were, in agreement concerning the choice of unit.

In connection with the finding here under discussion, the Trial Examiner makes an extensive footnote (9 on page 8) relating to the "time when the impasse" was reached. This would seem to have significance in the Trial Examiner's reasoning because of the stress placed upon the collapse of negotiations in the Morand case prior to the Local proposing separate negotiations in that matter. Here we submit that the date of "impasse" has no significance, other than to negative the suggestion that the contract was terminated on June 1, 1949. Every strike is preceded by an impasse—otherwise there would be no strike. And the existence of an impasse, even under the Morand theory, does not automatically change the unit from multiple to single. At most, it may give the Union an alternative. But here, the Union did not adopt the alternative. Unless the Board should find that the mere fact a striking a portion of a unit, while still contending it to be appropriate, ipso facto destroys the unit.

At the outset of the discussion under this Exception, observation was made that it appeared that the Trial Examiner had failed to grasp the distinctions between this case and the Morand case. Counsel recognizes the possibility that this Board intended to establish a new concept of labor relations—one which would permit a Union to reshape a recognized collective bargaining unit by strike action alone—but if this be true, the Board should state its position in plain terms. The possibility also exists, of course, that the Board intended to establish the concept that a Union could both cling to a single unit, however composed, and strike that unit by degrees as a matter of strategy, and at the same time preserve the fiction that although employees remaining on the job within the unit were engaging in concerted action for the common objective, nevertheless they should not be considered as strikers. Again, if this be so, the Board should state its position in clear terms.

Exception Number 8

The finding that the Employers "withholding of employment" amounted to conduct proscribed by the Act in order to prevent a strike is erroneous.

We are unable to follow the Trial Examiner's reasoning in determining that the Respondents acted to "prevent a strike". The stores were closed because a strike condition existed. The employees were considered to be strikers, and were treated as such. To find that employers treated workers as strikers in order to prevent a strike would seem to be the acme

of nonsense. However, having assumed all the other premises, the Trial Examiner evidently could reach no other conclusion. But, for the reasons set forth herein, we submit that it should be rejected.

Exception Number 9

The finding that, by closing their plants, the employers interfered with, restrained and coerced their employees in the exercise of the rights guaranteed them under the Act is erroneous.

This finding, also in the nature of a conclusion, follows from the previous findings and conclusions of the Trial Examiner. We believe it to be erroneous.

Exception Number 10

Each and all of the findings, recommendations and conclusions of law contained in sections numbered IV and V of the Report, as well as those on pages 10 and 11 thereof, are contrary to the law and the facts, insofar as they are based upon the theory that Respondents have been guilty of unfair labor practices.

In connection with the specific exceptions set forth herein, we have endeavored to outline some of the arguments which we believe the Board should consider in reviewing the Report and Recommendations of the Trial Examiner. In addition, we are attaching to this statement of exceptions a copy of the memorandum which was filed with the Trial Examiner prior to the issuance of his Report.

Because of the far reaching effect of the doctrine announced by the Trial Examiner in extending the

Morand doctrine, and because of the impact it has upon the widely accepted practices of multi-employer bargaining on the Pacific Coast, we again request the Board to permit oral argument, as well as the filing of written briefs by interested associations, many of which have indicated to us a desire to file memoranda, if permitted to do so by the Board.

Dated: March 8, 1951.

Respectfully submitted,

ST. SURE & MOORE,

/s/ By J. PAUL ST. SURE,

Attorneys for Respondents and Intervenor.

United States of America
Before the National Labor Relations Board

Case No. 20-CA-250

In the Matter of

Albert Leonard, Arnold Davis, Sidney Davis and William Gitzes, co-partners, jointly and severally, d/b/a DAVIS FURNITURE CO.

Case No. 20-CA-264

DOYLE FURNITURE CO., INC., a corporation.

Case No. 20-CA-252

LACHMAN BROS., a corporation.

Case No. 20-CA-249

Harry Frank, an individual, d/b/a MILWAUKEE FURNITURE COMPANY.

Case No. 20-CA-246

A. Eugene Pagano and M. de Castro, co-partners, jointly and severally, d/b/a MISSION CARPET AND FURNITURE CO.

Case No. 20-CA-245

FRANK NEWMAN CO., a corporation.

Case No. 20-CA-247

REDLICK-NEWMAN CO., a corporation.

Case No. 20-CA-253

SHAFF'S FURNITURE CO., a corporation.

Case No. 20-CA-254

Joseph H. Spiegelman and Leon Spiegelman, co-partners, jointly and severally, d/b/a SAN FRANCISCO FURNITURE CO.

Case No. 20-CA-248

STERLING FURNITURE COMPANY, a corporation.

Case No. 20-CA-251

James F. Wiley and Verna M. Gardner, co-partners, jointly and severally, d/b/a J. H. WILEY THE FURNITURE MAN.

and

CARROLL, DAVIS & FREIDENRICH, by ROLAND C. DAVIS.

DECISION AND ORDER

On February 16, 1951, Trial Examiner J. J. Fitzpatrick issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in unfair labor practices as alleged in the complaint and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report, and a supporting brief.[1] The Respondents also requested oral argument.

The oral argument request is hereby denied, as the record, including the exceptions and brief, in our opinion, adequately present the issues and positions of the parties.

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions and

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[1] On April 24, 1951, six employer associations filed a "Petition for Permission to File Brief Amicus Curiae or, in the alternative, to intervene in opposition to the Intermediate Report and Recommended Order of the Trial Examiner" and a "Brief in Opposition to the Intermediate Report and Recommended Order of the Trial Examiner." The petition must be denied as untimely, as the Board had already decided the merits of the case before receipt of the petition. Briefs from the parties to the case were due and had been received by March 12, 1951.

recommendations of the Trial Examiner with the following additions.[2]

The relevant facts in the instant case are substantially as follows. The Retail Clerks International Association, Local 1285 (AFL), herein called the Union, has bargained with the Retail Furniture Association of California on behalf of a number of its members since 1937. An impasse over a new contract occurred on June 3, 1949. At that time, the Union told the Association that the Union would probably strike one of the association members, Union Furniture Company, where wages were lower for most employees than for employees of other members. The next day the Union placed pickets at the warehouse and two stores of Union Furniture Company, and none of its union employees reported for work. The employees of all other association members reported for work as usual. However, 11 of the 19 employer-members of the Association, Respondents

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[2] Without giving figures, the Respondents contend that the volume of commerce activity of some of the Respondents is so small that the Board would not assert jurisdiction over them as separate entities, and that the Trial Examiner's action in basing jurisdiction on the total commerce activities of the Respondents as a group is inconsistent with the General Counsel's prosecution of a complaint alleging unfair labor practices against each Respondent as a separate entity. We perceive no such inconsistency. The liability of each Respondent is an individual liability. The Trial Examiner made his jurisdictional finding, and we think properly so, on the basis of the total activities of the Respondents because they had joined together to act as a single group for the purposes of collective bargaining, as hereinafter appears.

herein, notified their employees by pamphlets or letters on June 4 that their stores were closed until further notice in view of the Union's strike action.[3]

The parties are in agreement that at no time did the Union attempt to bargain on other than an association-wide basis; in that respect, the facts in this case are weaker for the Respondents' ultimate contention than were those in the Morand case, infra. The Union did not threaten to strike any other member of the Association. The Union selected Union Furniture as the target for strike action because the Union believed that that employer was the obstacle to reaching agreement on an association-wide basis. In response to a letter from the claimants' attorney advising that the claimants have at all times been and still were "ready, willing and able to continue their employment," the Respondents' attorney replied by letter, dated June 13, 1949, that because negotiations had been conducted on the basis of a group unit and no separate demands had been made on Union Furniture, the Respondents regarded the strike as one against all employers in the unit. The strike was settled on or about July 9, 1949, when all the employees, including those of the 11 employers who were not struck, returned to work and an association-wide contract was concluded.

The complaint alleges that the 11 employers dis-

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[3] Before the strike, the members of the Association agreed that if less than all of them were struck, the others would close to protect the competitive position of all of them. However, eight of the employer-members of the bargaining unit did not shut down.

criminatorily locked out their employees during the period from June 4 to July 9, 1949, in violation of Section 8 (a) (1) and 8 (a) (3) of the Act.

The Trial Examiner sustained the allegations of the complaint on the basis of the Board's decision in Morand Brothers Beverage Company, 91 NLRB No. 58. In that case, the Board held that a strike against a single employer of an association-employer unit did not under the statute justify the discharge of employees by association employers whose stores were not struck.

We agree with the Trial Examiner that the principles and policy considerations enunciated in the Morand decision are equally applicable to the facts in the instant case, where the employees were temporarily prevented from working by the Respondents' action in laying them off rather than discharging them. Regardless of how the strike may be viewed, the fact remains, as found by the Trial Examiner, that the Respondents laid off their employees because of protected concerted activity sponsored by the Union as their statutory bargaining representative and engaged in by union members of the same bargaining unit. The layoffs thus served notice on all members of the bargaining unit, the laid-off employees as well as the strikers and nonstrikers, that resort to lawful protected concerted activity by the employees of any employer-member of the bargaining unit would subject other employee-members of the bargaining unit to the reprisal of a temporary loss of employment. The Respondents' conduct thereby directly interfered with, restrained, and coerced all the

employees in the bargaining unit in the exercise of their rights guaranteed by Section 7 of the Act, in violation of Section 8 (a) (1). The layoffs also constituted discrimination in the hire and tenure of employment of the Respondents' employees because of the union-sponsored strike against Union Furniture Company, thereby discouraging membership in the Union in violation of Section 8 (a) (3) of the Act. Whether the Respondents' conduct be viewed as a violation of Section 8 (a) (1) or of 8 (a) (3), we find that effectuation of the policies of the Act requires that the Respondents' employees be made whole in the manner set forth in the Intermediate Report.

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that each of the Respondents, Albert Leonard, Arnold Davis, Sidney Davis and William Gitzes, co-partners, jointly and severally, d/b/a Davis Furniture Co., Doyle Furniture Co., Inc., a corporation, Lachman Bros., a corporation, Harry Frank, an individual, d/b/a Milwaukee Furniture Company, A. Eugene Pagano and M. de Castro, co-partners, jointly and severally, d/b/a Mission Carpet and Furniture Co., Frank Newman Co., a corporation, Redlick-Newman Co., a corporation, Shaff's Furniture Co., a corporation, Joseph H. Spiegelman and Leon Speigelman, co-partners, jointly and severally, d/b/a San Francisco Furniture Co., Sterling Furniture Company, a corporation, James F. Wiley and Verna M. Gardner, co-partners, jointly and severally,

d/b/a J. H. Wiley The Furniture Man, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Master Furniture Guild, Local 1285, affiliated with Retail Clerks International Association, AFL, or in any other labor organization of its employees, by locking them out or otherwise discriminating in regard to their tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Master Furniture Guild, Local 1285, affiliated with Retail Clerks International Association, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as guaranteed by Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole each of its employees for the discrimination against him in the manner set forth in

the section of the Intermediate Report entitled "The remedy."

(b) Post at its places of business in the San Francisco area, copies of the notice attached hereto, marked Appendix.[4] Copies of said notice, to be furnished each Respondent by the Regional Director for Twentieth Region (San Francisco, California), shall, after being signed by an appropriate representative of each Respondent, be posted by said Respondent immediately thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Twentieth Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

Dated at Washington, D. C., May 3, 1951.

PAUL M. HERZOG, Chairman
JOHN M. HOUSTON, Member
ABE MURDOCK, Member
PAUL L. STYLES, Member
[Seal] NATIONAL LABOR RELATIONS BOARD

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[4] In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be inserted in the notice, before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

Appendix
Notice to All Employees Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Master Furniture Guild, Local 1285, affiliated with Retail Clerks International Association, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We Will make whole each of our employees for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become or remain or to refrain from becoming or remaining members of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term

or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

Dated.....

.....
(Employer)

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service by mail attached.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-250, et al.

In the Matter of
DAVIS FURNITURE CO., et al.,
and
CARROLL, DAVIS & FREIDENRICH

Room 632, Pacific Building, 821 Market Street, San Francisco, Calif., Monday, Dec. 18, 1950

Pursuant to notice, the above entitled matter came on for hearing at 10 o'clock, a.m.

Before: J. J. Fitzpatrick, Esq., Trial Examiner.

Appearances:

David Karasick, Esq., San Francisco, Calif., appearing on behalf of the General Counsel, National Labor Relations Board.

Roland C. Davis, Esq., appearing on behalf of Carroll, Davis & Freidenrich, the Charging Party.

J. Paul St. Sure, Esq., St. Sure and Moore, appearing on behalf Davis Furniture Co., et al., the Respondents.

R. B. McDonough, Esq., St. Sure and Moore, appearing on behalf Davis Furniture Co., et al., the Respondents. [1*]

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

INTERVENOR'S EXHIBIT No. 1

Stores Authorizing Association to Negotiate

Davis Furniture, Doyle Furniture, Exhibit Furniture, G. B. Jackson & Son, Griffin-Cummins Furniture, Kay Furniture, R. Knight & Son, Lachman Brothers, Linn & Pynch, Milwaukee Furniture, Mission Carpet and Furniture, Frank Newman Co., Provident Furniture, Redlick's, Richmond, San Francisco Furniture, Shaff's Furniture, Sterling Furniture, Union Furniture, Waxman Furniture, Wiley Furniture, Zais Furniture.

PROCEEDINGS

* * * * *

Mr. Karasick: In other words, as I understand it, you are willing to stipulate, Mr. St. Sure, that the facts as alleged in paragraph 2 of the consolidated Complaint are correct and may be so found by the Board and subject to your argument as to whether or not there is jurisdiction?

Mr. St. Sure: The facts related to total shipments and purchases in the total unit amount to the sums set forth in paragraph 2 of the Complaint.

Mr. Karasick: Very good.

Mr. St. Sure: That is the extent of my stipulation.

Mr. Karasick: Very well. I accept the stipulation. So [34] stipulated.

Trial Examiner Fitzpatrick: May the record so show.

Mr. Karasick: I call Mr. Sparlin.

JACK H. SPARLIN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Karasick): State your full name and address for the record, please.

A. Jack H. Sparlin, S-p-a-r-l-i-n; 1147 Adison Drive, San Leandro.

Q. Mr. Sparlin, what is your present occupation?

A. I am the business representative and secretary of the Master Furniture Guild, Local 1285.

Q. And that is a labor organization which represents employees in this area, in various retail furniture stores and bargains with employers concerning wages and hours and working conditions; is that correct? A. That's correct.

Q. Is it affiliated with any other labor organization?

A. Yes, we are affiliated with the Retail Clerks Union, National Association.

Q. And that in turn is affiliated with what organization?

A. The American Federation of Labor.

Q. How long have you held your position as business agent of [35] the Local?

A. Approximately four years.

Q. And how long have you been financial secretary?

A. Three years, beginning January of this coming year.

(Testimony of Jack H. Sparlin)

Q. Prior to that time you had been a member of the Union?

A. I had been, yes.

Q. By reason of your position as business agent and financial secretary of the Union, do you have access to these various records of the Union concerning various bargaining negotiations between your local and various employers in the area?

A. I have access to all the records in our office.

Q. And by reason of that access are you familiar generally with the course of conduct of bargaining negotiations that have been carried on between the Local and various retail furniture stores in the San Francisco area? A. Yes, I am.

Q. Is there an association of employers known as the Retail Furniture Association of California which is instituted in this area?

A. I believe there is.

Q. And is that a trade association of various employers in the retail furniture business?

A. Yes, that's true.

Mr. Karasick: I think counsel will stipulate that at all times material hereto and at the present time there are approximately [36] 400 employers in the Retail Furniture Association of California; is that correct?

Mr. St. Sure: I think that is true. I assume this is for the purpose of identifying this rather complex unit that we are getting to; is that the purpose of it?

(Testimony of Jack H. Sparlin)

Mr. Karasick: Yes. I want to break it down to show exactly what it is.

Q. (By Mr. Karasick): Now, the Retail Furniture Association of California, if I understand, has within it as a group a number of employers who are known as the San Francisco Unit or group?

A. That is my understanding, yes.

Mr. Karasick: And I believe counsel will be willing to stipulate that at all times material herein and at the present time there are approximately 65 such employers who are retail furniture dealers in the San Francisco Unit or group of the Retail Furniture Association of California.

Mr. St. Sure: That is the trade association as such. That's correct.

Mr. Karasick: Yes. Thank you.

Q. (By Mr. Karasick): Now, had certain retail furniture dealers in the San Francisco area who were included in this group of approximately 65, from time to time over the course of the years, bargained with the Union on a group or unit basis?

A. That is correct. [37]

Q. At no time has that group included all of the 65 members of the San Francisco group of the trade association, has it?

A. Never included that many stores, I am sure.

Q. How did the stores which did band together for the purpose of collective bargaining with the Local indicate that they wished to bargain in such a manner, do you know?

A. From my information that I have since the

(Testimony of Jack H. Sparlin)

time that I have been representative, a representative of the employers group would give me a list of the stores that they wished to represent, stating that those stores had given an authorization to them to be represented by them in collective bargaining.

Trial Examiner Fitzpatrick: Off the record.

(Discussion off the record.)

Trial Examiner Fitzpatrick: On the record.

Q. (By Mr. Karasick): Was my understanding correct that certain of the group of 65 employers of the San Francisco group gave authorization to members of the committee of the association to bargain with the Local Union?

A. That is my understanding.

Q. How long has bargaining on such a basis been conducted between the Local Union which you now represent and the employers group in question which is part of the San Francisco group?

A. According to my files, since 1937.

Q. And up until 1948, who represented the employers to bargain with the Local each year? [38]

A. Well, since I have been representative of the Union, there was a committee from the employers sat down with a committee from the Union to negotiate.

Q. Was the committee of the employers the same each year, or was it different?

A. Not necessarily, but generally so.

Q. Do you know Mr. Brown who is in this hearing room? A. I do.

(Testimony of Jack H. Sparlin)

Q. And he is an official of the Retail Furniture Association of California?

A. That is my understanding, yes.

Q. And do you know his title?

A. Managing Director of the Retail Furniture Association of California.

Q. Did he, prior to 1948, take part in negotiations as one of the employer representatives——

Mr. St. Sure: This, I assume, is limited to the time that Mr. Sparlin—limits his answer to during the time that he has been business agent?

Mr. Karasick: Well, I hadn't so intended.

Mr. St. Sure: He did, because otherwise being factual, I think if you wish——

Mr. Karasick: May we be off the record for a moment?

Trial Examiner Fitzpatrick: Off the record.

(Discussion off the record.) [39]

Trial Examiner Fitzpatrick: On the record.

Mr. Karasick: It is my understanding that counsel for the Respondents and counsel for the General Counsel stipulate that in 1937 Mr. St. Sure was a representative of the employer group which was—which negotiated with the Local with respect to collective bargaining matters and that after that time various representatives of the employers represented the employer group up to 1949, when Mr. St. Sure and Mr. Brown as Managing Director of the Association were requested by the employer group to represent them for the purposes of negotiation with the Local, and that at all times since 1937

(Testimony of Jack H. Sparlin)

either Mr. Brown who is now the present managing director of the Association, or Mr. Fitch who was his predecessor in that position, was a representative of the employers group which represented the employers and bargained with the Local from year to year.

Is that a correct statement?

Mr. St. Sure: That is correct.

Q. (By Mr. Karasick): Now, I understood you to say bargaining negotiations had been carried on since 1937 up to the present time between various employers who were members of, and gave express written authorization to, the San Francisco group of Retail Employers Association and the Local Union; is that correct? A. That's right.

* * * * * [40]

Q. But at all times from 1937 to and through 1948 and, as a matter of fact, up to the present time, there have been negotiations carried on and contracts existing, agreements existing, between the various members so authorized of the employers group and the Local Union?

A. That's correct.

Q. In 1948 was a collective bargaining agreement consummated between various employers who were members of the San Francisco group of the Retail Furniture Association and the Master Furniture Guild, Local 1285? A. Yes, there was.

Q. And was that contract executed and effected as of January 1, 1948?

A. That is correct.

(Testimony of Jack H. Sparlin)

* * * * * [41]

Q. (By Mr. Karasick): Now, in 1948, Mr. Sparlin, were any steps taken by the Union with respect to proposed changes or amendments of the contract which is General Counsel's Exhibit 28?

A. Yes. Prior to the first of November we sent a letter to Mr. Brown asking that amendments to the contract for the coming year be negotiated.

Q. Now, who sent that letter to Mr. Brown?

A. I sent that in behalf of the Union. [42]

Q. Do you remember when it was sent?

A. It was in the latter part of October; I am not sure of the exact date.

* * * * * [43]

Q. (By Mr. Karasick): Following the sending of this letter by you to Mr. Brown, and I am referring to the letter which is General Counsel's Exhibit 29, was there any meeting or were there any attempts to negotiate between the Local Union you represent and the group of employers Mr. Brown represented? Were any negotiations carried on?

A. Yes. [44]

Q. When did they commence?

A. Well, if I may refer to my notes——

Trial Examiner Fitzpatrick: Off the record.

(Discussion off the record.)

Trial Examiner Fitzpatrick: On the record.

Q. (By Mr. Karasick): Now, will you please tell the Examiner when the first negotiating committee occurred between the Local and various em-

(Testimony of Jack H. Sparlin)

ployers represented by Mr. Brown and others, occurred, following your letter of October 20, 1948, which is General Counsel's Exhibit 29?

A. The time of the meeting?

Q. The date.

A. The date was December 3, 1948, the first meeting after that letter.

Q. And the individuals who represented the employers involved in those negotiations are Mr. Brown and Mr. St. Sure; is that correct?

A. That's right.

Q. And they got together with you and other representatives of the Local Union?

A. That is right.

Q. Now, either at that or a subsequent negotiating meeting between the parties, did Mr. Brown inform you of the specific employers who had given him written authorizations to represent them together with Mr. St. Sure in bargaining negotiations with [45] the Union?

A. He did, but not at this meeting. He did it a little later.

Q. At a later meeting? A. Yes.

Q. I hand you Intervenor's Exhibit No. 1 and ask you if that is a list of the employers which was given to you by Mr. Brown at that time?

A. Well, that is the list of stores that was given to me. I don't remember the exact time.

Q. Was it given to you by Mr. Brown?

A. Yes, it was.

Q. And what did Mr. Brown say about it?

(Testimony of Jack H. Sparlin)

A. He said that that was the list of the employers who had given him authorizations for them to be represented by Mr. St. Sure and Mr. Brown.

Q. And it was with respect to the employees of these specifically named employers on Intervenor's Exhibit 1 for bargaining negotiations before December 3rd, 1948, is that correct?

A. That's right. [46]

* * * * *

Q. Now, what were the major issues at the meeting of December 9th?

A. Well, about the only thing that we talked about at that meeting, as I recall, was wages. Mr. St. Sure came in and gave us an offer and that was principally the main thing that was talked about at that meeting.

* * * * *

Q. Now, at this meeting on December 15th, what were the major issues that were discussed?

A. Well, of course wages was our primary issue at all times, and the sixth day overtime on the five-day week was constantly coming up at that time.

* * * * *

Q. The contract by its terms was supposed to expire what time? [48]

A. December 31st, 1949.

Q. Was there any agreement reached with respect to the expiration of the contract?

A. At this meeting?

Q. At any meeting.

A. Oh, yes, there was, at a later date. There was

(Testimony of Jack H. Sparlin)

an agreement to extend the present agreement for the period of negotiations.

Q. Was that agreement in writing?

A. Yes.

Q. I hand you General Counsel's Exhibit 31 for identification and ask you if that is the agreement you have reference to. A. That is right.

Q. Now, to the left in the margin is a line drawn where it says, "45 days J.B.St.S.," which line runs around the words, "30 days," in the typewritten matter.

Will you explain what that was for?

A. Well, before the 30 days was up, we had extended the agreement—we found that there would probably be need for more time and it was agreed at that *that* meeting that we'd extend it—at a later date, it would be extended for 45 days instead of for 30.

Q. Now in other words, this document is dated December 27th, 1940, is it not?

A. That's right.

Q. It originally was an agreement to extend the contract for [49] 30 days beyond January 1, 1948, is that correct? A. That's right.

Q. Then there was an agreement to extend it for 45 days beyond that date, initialed by Mr. St. Sure; is that correct? A. That's right.

Q. Beneath—beneath the paragraph written before the signatures are the words, "Extended to March 10, 1948," with Mr. St. Sure's signature. Is that—does that statement that there was an agree-

(Testimony of Jack H. Sparlin)

ment to extend this contract again until March 10, 1949? A. That is correct.

* * * * * [50]

Q. Beneath the words which I have just read and you have just spoken about, at the bottom of the document are the words, "Labor Council agreed on extension through April 10," and to the left and beneath it, "3-7-49 re G. Johns." Will you explain what that notation means?

A. Well, that I wrote on there myself, having talked to Mr. George Johns, the Labor counsel by phone, and he said that Mr. St. Sure had agreed with him verbally to extend the contract through April 10 for further negotiations, so I made that note on there so I would know what it was.

* * * * * [51]

Q. (By Mr. Karasick): Were there any further agreements between the parties with respect to acception of the contract after April 10, 1949?

Mr. St. Sure: What kind do you mean; written agreements?

Mr. Karasick: Written or oral.

The Witness: Well, between myself, do you mean, or between the Union and Mr. St. Sure?

Q. (By Mr. Karasick): Yes. Was there any agreement as to whether or not the contract would be extended beyond the April 10th deadline shown in that document?

A. Well, it is my understanding between the employers' representative, Mr. St. Sure and the

(Testimony of Jack H. Sparlin)

representative from the San Francisco Labor Council, that it would be extended.

Q. Until what date?

A. Well, at that time it was stated that it would be until one side or the other side broke off negotiations, and the contract would not be needed any further.

Q. Do I understand that it was your understanding that the contract would continue in effect as long as there were negotiations between the parties?

A. That's right.

Q. Did either Mr. St. Sure or Mr. Brown or any other representative [53] of the employers involved terminate the contract? A. No.

Q. As far as you know, that was the understanding? A. Right. [54]

* * * * *

Q. And what was discussed primarily at that meeting?

A. Primarily, wages were discussed at this meeting.

Q. Was there any agreement upon wages?

A. No, there wasn't.

Q. Was there anything specifically that was to be done with respect to the wage issue?

A. Yes; it was agreed that because of certain charges I have made that a certain employer was not paying what the others were and was therefore burdening the others—and we pointed out this one particular employer who was relieved by the committee who was not paying more than the most—con-

(Testimony of Jack H. Sparlin)

tract rates for as the majority of employers were paying more than the contract rates, we believed because of that, why this one particular employer was not willing to go along with the rest of them, so Mr. St. Sure suggested that that may be true, and that someone should make a survey, and he would try to get that information from the employers he represented. [55]

Q. And did the Union committee agree to that?

A. We agreed to that.

Q. Did the Union committee name the employer that they felt was holding out on wages?

A. Yes, we did suggest that we thought it was the Union Furniture Company where we found—we knew that they were not paying as much as the other employers for certain classifications, and we believed that it was because of that, that they were not willing to go along with the group.

* * * * * [56]

Q. Well, was there a further meeting held afterwards?

A. Yes, on February 25th there was a meeting held.

Q. And what were the major issues discussed then?

A. Well, Mr. St. Sure—We only discussed wages, primarily.

Q. That was still the big issue?

A. That was the issue, and he informed us that they had nothing further to offer other than—in

(Testimony of Jack H. Sparlin)

fact the first offer they had made us, the cost of living increase.

Q. Amounting to what?

A. Approximately five cents per hour.

Q. When had that been made?

A. That had been made just prior to January—during the month of December.

Q. Now, Mr. St. Sure said he had nothing to offer in the way of wage negotiations, is that right?

A. That is right.

Q. Did he say anything else as you recall?

A. Well, he said he didn't see any need for a further meeting on this point.

* * * * * [59]

After Recess

Q. Did you as a representative of the Local Union at or shortly after the meeting of February 25th, report to the membership as to the result of negotiations between the parties? A. Yes, I did.

* * * * * [61]

Q. What did you report to the Union membership?

A. Well, we reported the progress of our negotiations up to that time, and the fact that we hadn't been able to agree particularly on the matter of wages.

Q. Now, did the Union—and by that, I mean the Local Union—have its membership take any action with respect to that situation?

(Testimony of Jack H. Sparlin)

A. Yes, they authorized the committee to request strike sanction from the San Francisco Labor Council, and asked for their assistance in the matter.

Q. Was it necessary to ask permission of the San Francisco Labor Council before a strike could be held?

A. Well, it was our general procedure, that all Local Unions affiliated with the San Francisco Labor Council would do that.

Q. That was your procedure? A. Yes.

Q. Was the action of the membership taken as the result—how was the action taken?

A. Well, the action was taken by the membership voting by a large majority to authorize the negotiating committee to proceed and ask for strike sanction against the source.

Q. So a strike vote was taken? A. It was.

Q. And the membership voted to strike with respect to whom?

A. With respect to all stores that were being negotiated or [62] represented by Mr. St. Sure.

Q. All the stores involved in these negotiations up to this time? A. That's right.

* * * *

[63]

Q. (By Mr. Karasick): Now, with counsel's statement in the stipulation to refresh your recollection, were you at this meeting on March 14th?

A. At the Labor Council, yes, sir; I was there.

Q. And whom else was present at that meeting; various representatives of the Labor Council?

A. Yes, the Executive Board of the Labor Coun-

(Testimony of Jack H. Sparlin)

cil and part of the members, Mr. St. Sure, Mr. Brown and myself, and Mr. Davis, I believe.

Q. And what was discussed at that meeting in general?

A. Well, in general, we gave our side of the story; they gave theirs, and the Labor Council Executive Board felt that there was room for more negotiations and possible settlement, and [70] suggested that we appoint a committee, a sub-committee from the Board to see if some agreement could be reached between the parties.

Q. And was that suggestion or procedure agreeable to both parties, the employers and the Local representatives? A. Yes, it was.

Q. And was the sub-committee so appointed?

A. It was.

Q. Who was that, on the sub-committee?

A. Mr. George Johns, I believe.

Q. One person? A. Only one.

Q. And his title was what?

A. At that time was Assistant Secretary of the San Francisco Labor Council.

* * * * * [71]

Q. (By Mr. Karasick): Well, at any rate, on April 20th you mentioned the Union Furniture Company?

Trial Examiner Fitzpatrick: April 15th?

Q. (By Mr. Karasick): I'm sorry; April 15th, yes.

A. Yes, it was brought up at this meeting. It hasn't been any particular secret at all and the com-

(Testimony of Jack H. Sparlin)

mittee had felt that the Union Furniture Company was one of the main employers that was holding up negotiations.

* * * * * [78]

Q. Well, now, in general, what was the discussion at the meeting of May 13?

A. Well, we came back to get our answer from Mr. St. Sure as to what the position of the employers would be with regard to the proposal for reclassification, and Mr. St. Sure informed us that the employers would not agree to any change in classification.

Q. Do I understand that it was Mr. St. Sure's position that the proposal made with respect to reclassifications was not acceptable to the employer group? A. That is correct.

Q. Did he say what would be acceptable?

A. He said that they would reiterate their offer on a 5 cents an hour increase and that was all and all he had to offer. If that wasn't accepted by June 1st of 1949 they would withdraw the offer or any offer of retroactivity.

* * * * * [84]

Q. Is there anything specifically that you, Mr. St. Sure, Mr. Brown, or anybody else discussed?

A. Well, we informed them that if that was their position and they wouldn't change their position any way, there was likely to be a strike in the industry or at least in this one store. We told them there would probably be a strike in the Union Furniture Company.

* * * * * [85]

(Testimony of Jack H. Sparlin)

Q. (By Mr. Karasick): At this meeting, Mr. Sparlin, some reference was made by you to Mr. St. Sure about the possibility of a strike, is that correct? A. That is correct.

Q. Now, will you tell us as best you recall what it is you said to Mr. St. Sure with reference to the possibility of a strike?

A. Well, as best I can remember we pointed out to Mr. St. Sure that we didn't believe this proposal would be acceptable to the people and that there probably would be a strike and it would probably be against Union Furniture Company.

Q. Now, so the record may be entirely clear and be no question about it, did you at that meeting say anything to Mr. St. Sure about a strike against any one other than Union Furniture Company?

A. No.

Q. Did Mr. St. Sure say anything about this when you told him that there might be such action taken?

A. He made some remark along the line that if such action was taken against the Union Furniture Company, the other employers would close, they had agreed to close, or something of that nature, I don't remember exactly.

* * * * * [86]

Trial Examiner Fitzpatrick: The witness knows what he has testified if I follow the question. He has already answered the question, if I follow him correctly: that the employers' representative at this

(Testimony of Jack H. Sparlin)

meeting advised the union [88] representatives that the employers position was that they were offering this 5 cent raise or whatever it was and that was their final proposition and had to be accepted by June 1st, or the offer, including the retroactive phase of it, would be withdrawn.

* * * * * [89]

Q. What had gone up to that time?

A. We had received word from Mr. St. Sure giving the outline of what they would give us and we went back and reported to the membership that they had made this offer, that they had changed it since we made our proposal, and that was all we had to offer them, and we asked for a strike vote, and the membership was informed that they had to accept this or we'd probably have to take a strike. There was very little else left for them to do. And the possibility of a strike. The committee reported to the membership that it was the belief of the committee all along the Union Furniture Company was the one that was refusing to go along or to bring about a settlement and suggested to them and asked them to support a strike against the Union Furniture Company. And the vote was taken. At that time there was the understanding that the committee would have authority to call a strike against the Union Furniture Company.

Q. And the union membership voted?

A. Yes, they did.

Q. Did they vote with respect to authorizing the committee to call a strike against any other furni-

(Testimony of Jack H. Sparlin)
ture company other than Union Furniture Company?

A. Well, the committee was left more or less free as far as the action was concerned. It was understood at the time that the Union Furniture Company would be the one if there was to be any strike at that particular time.

* * * * * [93]

Q. And in general what was the discussion there?

A. Well, Mr. St. Sure informed us again that he had nothing new to offer; said the previous offer was the last offer and Mr. Johns said that he would like to ask Mr. St. Sure and our committee if we would agree to arbitrate the wage issue, and our committee said that we would agree to recommend that and Mr. St. Sure said that he would go back and talk to the employers about that.

* * * * * [96]

Q. Did Mr. St. Sure subsequently inform you whether or not the employers would agree to arbitration of the wages? Of the wage issue?

A. I believe—Mr. Johns informed me that Mr. St. Sure said he would refuse the arbitration.

Q. The employers declined? A. Yes.

* * * * * [97]

Q. Do you recall anything further that was discussed at that meeting?

A. Well, Mr. St. Sure was informed at that meeting that there would probably be a strike

(Testimony of Jack H. Sparlin)

against the Union Furniture Company, I believe the next day, if I'm not mistaken.

Q. Who told him that?

A. Well, members of our committee, I don't remember the exact ones.

Q. Were you present when he was told?

A. I was present in the meeting, yes.

Trial Examiner Fitzpatrick: Did you fix a time as to this meeting at the Labor Council? I understood the witness has stated that his recollection was that they had a meeting after the first of June, I don't recall that it was fixed, with any greater particularity.

Mr. St. Sure: I suggest that maybe counsel will agree it was on the evening of June 3rd, the evening before the strike occurred.

* * * * *

[100]

Q. What, if anything, happened on June 4, 1949?

A. Well, on June 4th, in regard to Union Furniture Company, pickets were placed on Union Furniture Company Warehouse and two stores on the morning about 7:30, I believe. And none of our people went to work at Union Furniture Company that morning.

Q. In other words, the employees of Union Furniture Company went on strike, is that it?

A. That's right.

* * * * *

Q. (By Mr. Karasick): Did the employees of any other employer that the union was negotiating

(Testimony of Jack H. Sparlin)

with up to this time walk off their jobs on June 4, 1949?

A. No, they did not.

Q. Or did they at any time after June 4, 1949, through and including July 9, 1949, walk off their jobs, or withhold their services from the employer because of any action taken by the union?

A. No, they did not.

Trial Examiner Fitzpatrick: Off the record.

(Discussion off the record.)

Trial Examiner Fitzpatrick: On the record.

Q. (By Mr. Karasick): Did the Union place any pickets at any time between June 4, 1949, and July 9, 1949, at any other establishment involved in negotiations with this union up to that time, other than Union Furniture Company?

A. No, they did not.

* * * * *

Q. (By Mr. Karasick): Did the union do anything in the way of inducing, encouraging or attempting to have the employees [105] of any employer other than Union Furniture Company withhold their services during any time between June 4, 1949, and July 9, 1949? A. No.

Q. As far as the union was concerned, were all employees of all other employers in the group we've been speaking about ready, willing and able to perform work for the employers in that group other than Union Furniture Company between June 4, 1949, and July 9, 1949?

(Testimony of Jack H. Sparlin)

A. Yes, they were ready to work at any time.

* * * * * [106]

Q. (By Mr. Karasick): Did the employees of the eleven respondents named in the consolidated complaint go to work on June 4, 1949?

A. Yes, they went to go to work.

Q. Did they work that day?

A. Some of them worked a short time before they were notified.

Q. Did they work a complete day?

A. No. [107]

Q. Did any of them to your knowledge?

A. I think one or two may have.

Q. Other than that were there any that worked a complete day on June 4, 1949?

A. Well, I don't know for sure.

Q. Why didn't they work?

A. They were told to go home.

Q. By whom?

A. By the employers or their immediate superiors.

* * * * * [108]

Q. (By Mr. Karasick): Following this, was a letter sent by Roland C. Davis, attorney for the employees, to the various furniture companies with reference to the employees' returning to work?

A. Yes, it was.

(Testimony of Jack H. Sparlin)

Q. And was such a letter sent to each one of the companies named in the consolidated complaint as respondents.

A. Yes, I believe there was.

Q. Was such a letter sent to Union Furniture Company? A. No. [113]

Q. Do you remember the date of the letter?

A. No; it was a week or two weeks after; the strike occurred on June 4th.

Q. I hand you a copy of a letter dated June 9, 1949, addressed to Davis Furniture Company, and purportedly signed by Roland C. Davis, containing a notation that the same letter had been sent to a number of other furniture companies whose names are listed at the bottom thereof, and whose names are also in the consolidated complaint and ask you if that is a copy of the letter to which you have reference? A. Yes.

Mr. Karasick: I offer the document in evidence, as General Counsel's Exhibit 43, and take it that counsel will be willing to agree that subject to his check it's an authentic copy?

Mr. St. Sure: That's right.

Trial Examiner Fitzpatrick: It will be received.

(The document heretofore marked General Counsel's Exhibit No. 42 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 43

Registered Mail Copy June 9, 1949

Davis Furniture Company
981 Mission Street
San Francisco, California

Gentlemen:

As you have known since Saturday, June 4, 1949, your employees who are members of Master Furniture Guild No. 1285 and covered by the collective bargaining contract of January 1, 1948, between your firm and the Guild, have been ready, willing and able to continue their employment with you.

This communication is to advise you officially that these employees remain continuously available for such employment and application is hereby made on their behalf for immediate reinstatement on their jobs.

If you do not intend to accept this application, please advise the undersigned of your reasons.

This application for reinstatement should be considered as continuously on file with you and will be immediately fulfilled by any or all of the employees for whom it is made upon notification by you directly to the employees or to the Master Furniture Guild or the undersigned.

Yours very truly,

CARROLL, DAVIS & FREIDENRICH
By ROLAND C. DAVIS,
Attorneys for Employees of Davis Furniture Company members of Master Furniture Guild No. 1285.

RCD/gn

General Counsel's Exhibit No. 43—(Continued)

Same letter sent to: Doyle Furniture Co., 821 Mission Street, Frank Newman, 2141 Mission Street, Lachman Bros., Mission 16th Streets, Milwaukee Furniture Co., 832 Mission St., Mission Carpet & Furniture Co., 2301 Mission St., Redlick's, 17th and Mission Streets, San Francisco Furniture Co., 839 Mission St., Shaff's Furniture Co., 2868 Mission St., Sterling Furniture Co., 1049 Market St., J. H. Wiley, 2098 Market Street.

Q. (By Mr. Karasick): Did Mr. Davis ever tell you whether he received a reply to the letter to Mr. St. Sure which is General Counsel's Exhibit 43?

A. No, he didn't.

Q. Did you ever see such a letter?

A. I don't recall; I may have. [114]

Q. Well, I hand you General Counsel's Exhibit 44 for identification and ask you if you ever *say* that—a letter of which that is a copy?

Mr. St. Sure: That's a copy of the one I wrote on the 13th of June to Mr. Davis, and I'll stipulate it was sent to Mr. Davis.

Mr. Davis: I'll stipulate I received it.

Mr. Karasick: Thank you.

I offer the document in evidence as General Counsel's Exhibit 44, being a copy of the letter in question.

A. I may have seen it.

Trial Examiner Fitzpatrick: It will be received as General Counsel's 44.

(The document heretofore marked General Counsel's Exhibit No. 44 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 44

Law Offices of St. Sure and Moore
Financial Center Building, Oakland 12, Calif.

Copy June 13, 1949

Roland C. Davis, Esquire
Balfour Building
San Francisco 4, California

Dear Roland:

The members of the San Francisco Furniture Store group who are represented by this office in negotiations for a renewal of the master contract with Retail Clerks Local No. 1285 have forwarded to me your letters of June 9, 1949, requesting reemployment of members of that local.

As your letter states, the employees are those covered by the collective bargaining contract of January 1, 1948, which was executed by Ralph A. Brown as a master contract and by Jack Sparlin on the same basis. Since negotiations for renewal have been carried on, at the special request of the union, on the basis of the group unit, and since the union made no separate demands on Union Furniture Company prior to the strike, we regard the strike as one against all of the employers. We have so notified the individual employees concerned.

Yours truly,

PAUL ST. SURE,
Attorney for San Francisco
Furniture Store Group.

JPSS/OB
CC Mr. Ralph A. Brown

(Testimony of Jack H. Sparlin)

* * * * *

[115]

Mr. Karasick: I would like to state for the record my understanding of the stipulation by and between counsel for the Respondents and counsel for the General Counsel to the effect that each of the Respondents named in the consolidated Complaint in this case ceased operations and closed for the period from [123] July 4, 1949——

Mr. St. Sure: June.

Mr. Karasick: Thank you. From the period of June 4, 1949 to July 9, 1949. Is that a correct statement, Mr. St. Sure?

Mr. St. Sure: That is correct. During that period these stores were closed and there were notices posted in the windows of each of the stores that they were closed due to strike conditions—I mean, that is the fact of the situation. The effect of what happened I am not commenting on. I will stipulate that they were closed and such signs were posted.

Mr. Karasick: So stipulated.

Trial Examiner Fitzpatrick: Very well.

* * * * *

[124]

Q. (By Mr. Karasick): Following June 4, 1949, Mr. Sparlin, did the parties finally come to an agreement and settlement of the dispute between them?

A. Yes, there was a settlement arrived at.

Q. Did the strike against Union Furniture Company end? A. Yes, it did.

Q. When?

(Testimony of Jack H. Sparlin)

A. Well, the strike actually ended, I believe, on the night of July 7.

Q. July 7th was a Thursday? A. Yes.

Q. When did they return to work?

A. Well, I think there were a few who returned to work on the 8th but the majority of them returned to work on Saturday the 9th. [126]

* * * * *

Q. Now, at any time after June 4, 1949, did you attempt to negotiate separately with the Union Furniture Company? A. No, we did not.

Q. Did you attempt to get a separate collective bargaining agreement with the Union Furniture Company? A. No.

Q. Did you attempt to separately bargain with any one of the employers in the employer group with whom you had been negotiating at any time during the period from June 4 to July 9th, 1949?

A. No, we did not.

* * * * *

Q. Why did the union call the strike on Union Furniture Company?

A. Well, the main reason for calling the strike was that we hadn't been able to get any where with our negotiations because of the wages, and the wages the Union Furniture Company had been paying, and it was historically true with them, they had always paid less than the rest of the industry, and it was the belief of our union committee, and in fact, the majority of the members, that the Union Furniture Company were the one that were blocking nego-

(Testimony of Jack H. Sparlin)

tiations, because of their historical stand, and we believe it was because of that that we were unable to reach an agreement with the employers' group.

Q. Did you want to bargain with any employer separately, or on a separate basis?

A. No, we didn't.

* * * * *

Cross Examination

Q. (By Mr. St. Sure): Isn't it true that the strike was called against the Union Furniture Company, Mr. Sparlin, as an individual store for the purpose of requiring that company to sign the master contract?

A. Well, we had no master contract at that particular time; we had a proposal for a settlement.

Q. Wasn't your purpose to strike the Union Furniture Company to require it to sign the same contract which you were proposing that others in the group sign?

A. Yes, we wanted all the stores to sign the same agreement. [132]

Q. And you wanted it to be signed in the form of a master agreement, didn't you? A. Yes.

Q. You wanted to continue the form of the agreement that you had had since 1937, I mean, in general form, of collective agreement on a multiple employer basis? A. General pattern, yes. [133]

* * * * *

Q. Now, how many strike votes were taken by the union membership?

A. I believe our records show there was two taken.

(Testimony of Jack H. Sparlin)

Q. When was the first?

A. In the early part of the year; I don't know the exact date.

Q. What does you record show as to the nature of that vote, what issue was voted upon?

A. Well, of course, all the reports to the membership show that the main issue was in the matter of wages at that time.

Q. No, I mean from this point of view, what did they vote to do: To strike or not to strike, and if so, whom were they going to strike as far as the membership was concerned?

A. At that time the negotiating committee and executive board asked for permission of the membership to ask for strike sanction against the stores, the group of stores, that were represented by Mr. St. Sure at that time.

Q. What about the second strike vote, if there was a second one?

A. There was a second one at a later date.

Q. When was that? [142]

A. I believe that was in May.

Q. What was the nature of that action?

A. At that time we reported back to the union membership and at that time we could see that we weren't getting settlement, and discussed the problems thoroughly with the membership—the negotiating committee and the executive board asked at that time for permission to call a strike against any one or all of the stores as they saw fit. During their discussions and so forth, the negotiating committee and

(Testimony of Jack H. Sparlin)
the executive board and different members told the membership at that time that there was a problem we felt the Union Furniture Company was holding out, and we wanted permission to strike any one or all of them because we felt at that time that we didn't want our hands tied, if there was to be a strike at that time we were pretty sure it would be the Union Furniture Company.

Q. But you specifically asked your membership for authority to leave in the hands of the executive board or the negotiating committee the right to determine whether there should be a strike against all the stores or one, and that one could be Union or it could be some other company; is that correct?

A. Could have been.

Q. And you asked that authority for strategic reasons, in order to try to accomplish your purpose of securing the master contract, is that correct?

A. Well, that is right. [143]

Q. Pardon me? A. That is right. [144]

* * * * *

Q. (By Mr. St. Sure): It was the determination of your committee and yourself and Mr. Johns, was it not, to call a strike against the Union Furniture Company for the purpose of endeavoring to enforce your demand for a group contract to include Union and other furniture companies that were then in negotiation; isn't that correct?

A. I believe it was. [147]

* * * * *

Mr. Karasick: Well, in the sense of the Moran Brothers holding they were discriminated against,

(Testimony of Jack H. Sparlin)

they were discriminated against by being locked out, and I don't want to argue technically whether the lockout is a discharge or lay-off or anything else. The Complaint alleges a lockout and relies on the fact that the employees were deprived of work during this period. [164]

* * * * *

Q. Do you recall my advising you and the members of your committee prior to the 4th of June 1949 that if one of the stores were struck, particularly if one of the major stores were struck, that the others would regard it as a strike against all of them?

A. Not in those words I don't recall it.

Q. Then in what words do you recall it?

A. Well, I do recall that our committee informed Mr. St. Sure at that time that there was a possibility that there might be a strike against Union Furniture Company, and Mr. St. Sure replied in passing—the exact words I can't recall, but it was something that the other stores said, "Well, if there is, we will probably be closed", or something to that effect. I don't know the exact wording.

Q. Do you recall about when that was?

A. As near as I can remember, it was during one of the meetings [169] in May; I don't know which meeting.

* * * * *

Redirect Examination

* * * * *

Q. (By Mr. Karasick): Following the offer of a ten dollar a month wage increase by the employers representatives on June 3, 1949, and at any time on

(Testimony of Jack H. Sparlin)

June 3 or on June 4, 1949, did any employer representative inform you that they wished to negotiate further with respect to wage rate issues or any other issues?

A. I don't recall any, no.

Q. Did Mr. Johns or any other person or representative of any other group, inform you that the employers wished to negotiate further on June 3rd or thereafter, within the next day or two?

A. I don't recall any.

Q. If the employers had indicated to you that they wished to [181] bargain further with respect to wages or any other issue at that time, would you have negotiated further?

A. Well, that would have been a matter for the committee to decide. I can't see any reason why they wouldn't have.

Q. Were you bound by any commitment that you must call a strike against the Union Furniture Company on June 4? A. No.

Q. As far as you were concerned, as a Union representative and a member of the negotiating committee, would you have been willing to bargain further if the employers had so indicated on June 3rd?

A. Sure, we would have been willing to bargain.

Q. Why did the Union call the strike on June 4 after this meeting of June 3, when the employer offer had been received?

A. Well, now, they stated to us that they made an offer and that offer was final and it had to be accepted by June 1, 1949, or otherwise the offer would be withdrawn, and we assumed that that meant that

(Testimony of Jack H. Sparlin)

was the end of negotiations, as far as they were concerned.

Q. Did you assume it meant anything with respect to the contract?

A. Well, yes, we assumed that there would be no further extension of the agreement, that that was the end of it.

Q. Do I understand that you mean that that it was your assumption that the employers were saying that if there was no agreement [182] reached between the parties, by June 1st, that the contract would be terminated as of that date?

A. Yes, that's right. [183]

* * * * *

J. PAUL ST. SURE

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McDonough): Mr. St. Sure, directing your attention to Intervenor's Exhibit 1, at the start of negotiations for the contract which was to become effective on January 1, 1949, did you represent the stores whose names appear on that list?

A. That is correct. The procedure over a period of years has been for Mr. Brown's office to send out to various stores in San Francisco who were members of the Retail Furniture Association and who had in their employment members—employees [199] who were members of 1285, a notice asking them whether or not they would authorize the negotiators

(Testimony of J. Paul St. Sure.)

for the group that normally executed a master contract to represent them in the current negotiations, and the stores listed on Intervenor's Exhibit 1 are the stores who returned authorization in response to that request. So those were the stores that Mr. Brown and I were representing at the time that the negotiations were undertaken.

Q. And you continued to represent the group of stores listed on Intervenor's Exhibit No. 1 down to June 3, 1949, is that correct?

A. Well, so far as the Exhibit Furniture Company was concerned, somewhere during the course of negotiations they were no longer parties to the negotiations, whether by reason of this agreement or was it by reason of the Union or by reason on the verge of going out of business, I have forgotten, but during the course of negotiations Exhibit Furniture Company dropped out of the picture.

As to the others that are referred to as the ten that did not jointly act by closing their stores at the time the Union Furniture Company had a picket line, it was some few days before the actual strike incident of June 4th that our representation of them became conditional. By that, I mean we had a meeting of the entire group and indicated to them that the Union negotiating committee had indicated that they might strike, not all of the group but some one of the group, and we specifically [200] asked, or I specifically asked the employers group whether or not, in the event that only one of the employers were struck whether others would take

(Testimony of J. Paul St. Sure.)

the action which seemed to me to be in order, that is, either to support the struck store by remaining open and endeavoring to subsidize, or by closing down in support of the struck store on the theory that a strike against one was a strike against all, whichever process might be followed.

At that time some of the smaller stores in the group we represented who had one or two employees only stated that they did not feel they could take either course of continuing a joint negotiation or strike action in the event that one of the stores might be singled out, that if they themselves were singled out they would not be able to resist the strike, therefore they felt they could not continue on in the group and expect the rest to support them.

So at that time we were advised—or I was advised by a representative of the Jackson & Son Company, Griffin-Cummins, Kay Furniture, R. Knight, Lynn & Pynch, Frank Newman Company, Provident Furniture, Richmond Furniture, and the Zais Furniture Company, that if the situation developed into a strike, whether against the group or against one of the group, they would not resist the Union's demand but would sign.

I then advised the remaining group that in the event that there was to be a strike, that is the eleven that are on the [201] list of Respondents, plus Union Furniture Company, that should they elect to regard a strike against one as a strike against all, and in the event that they should close their stores upon one of them being struck, they should

(Testimony of J. Paul St. Sure.)

inform the employees that they were regarded as being on strike; they should not sever their employment, they should continue them on the payroll as strikers and be prepared to receive them back in employment if and when the strike was settled, with protection with regards to seniority and other benefits that might accrue under contract under a strike situation.

On that basis the group that remained—there were thirteen at that time including Waxman Furniture Company, they believed that if the Union singled one out as a matter of strategy they would all close as a matter of competitive necessity, in view of the joint negotiations they had had, and it was so understood, as of that meeting which was during the last week of May. I believe it was on the final night of June 3 when we were still endeavoring to negotiate with the committee from the Central Labor Council and the representatives of the Clerks Union that we were told or I was told by Mr. Johns the possibility was that they would strike the Union Furniture Company alone, that I conveyed the information to the remaining members of the group and was then informed by the Waxman Furniture Company that it too would have to withdraw from the bargaining group because they would have to regard the strike as being a loss. [202] They were not prepared to face a strike or close up on the theory that a strike against one was a strike against all, so that with that reservation and rather long statement I continued to represent

(Testimony of J. Paul St. Sure.)

all of the group with the exceptions that I mentioned. The Exhibit dropped out somewhere early in the picture, nine dropped out when it became apparent that there might be a strike against a single one within the group and those said they could not take the pressure of being struck individually—or closing in support of a struck store and finally the Waxman Furniture Company took a similar view on the very eve of the strike. That's the Union Furniture Company.

Q. You have mentioned in the group of stores which appear on Intervenor's Exhibit 1 that some of them and in fact the group that did not pursue the same procedure as the Respondents in this proceeding were smaller employers. By that I understand that you employed a smaller number of people in their store?

A. Well, that's correct. May I have that transcript of the unemployment proceedings. Without endeavoring to infringe upon the suggestion made this morning on agreeing to the list of employees, the Sterling Furniture Company, I believe, employed something like a hundred people within this jurisdiction and an even larger number who would not be within the jurisdiction of this union. Redlick's Furniture Company employed approximately 60 employees under the jurisdiction of this [203] Union and an equal or greater number of members of other unions or non-union. Lachman employed 95 or a hundred members under this Union and an equal or larger number of members of other crafts

(Testimony of J. Paul St. Sure.)

or non-union people; the Union Furniture Company employed—I forget—maybe 40 or 50 within the jurisdiction of this union, and an equal or larger number of other employees, and so on. [204]

* * * * *

Subsequent letters were addressed to the companies outlining the situation which has developed, and I think a letter of that type is likewise in the file, and I believe it was the one sent out by the Redlick-Newman Company, and the employers were instructed that if any employee desired to report for work they should be told that the employers believed that a strike existed, that their jobs would be available to them when the strike was settled, that they were not severed and that they were not terminated and that no severance notices were to be given to the employees in those stores. [205]

* * * * *

Cross Examination

Q. (By Mr. Karasick): There have been times since when employers have been involved in joint negotiations on a group basis and the union has struck only one of them or not all of the employers and the same result has not been followed on the part of the employers?

A. You will find in this area a pattern of both kind of results; you will find situations here in this area where a strike against one has almost universally been regarded as a strike against the entire group. For example, in the metal trades, the machinists' strike of some years ago. You can find others of the same type and character. By the same token, you

(Testimony of J. Paul St. Sure.)

will find situations where employers and bargaining groups have determined the thing to do is to have those who are not struck remain open and support the struck store in the same fashion that the union in this strike announced an assessment on the working members to support the strike.

Q. And sometimes even the struck employers have continued to operate despite the strike, as well as—— A. That likewise has occurred.

Q. And that occurred in the Safeway situation in Alameda and Contra Costa Counties recently, did it not?

A. In Alameda and Contra Costa Counties they stayed open and in San Francisco County they closed. So right there you have [209] two different patterns in the same situation.

Q. So there is no uniformity in this area with respect to results you can expect in such a situation?

A. I know of none.

Mr. Karasick: No further questions.

Q. (By Mr. Davis): On this last point, as I understand you, you pointed out that there is no uniformity in this matter, doesn't it get down to just about a question as to whether or not the employer or employer group decide whether or not they shall take this action as to whether or not they decide a strike against one is a strike against all?

* * * * *

A. Well, I would say, Mr. Davis, it is to be attributed to the same lack of uniformity that exists in

(Testimony of J. Paul St. Sure.)

the union thinking, in the situations where they act differently in different [210] circumstances, apparently, under group negotiations, just as the unions apparently elect, as a matter of strategy, depending upon what they believe to be the best strategy, sometimes to strike one of the group, sometimes two or three of a group, sometimes all of a group. So likewise do employers, in connection with a strike situation of that kind, endeavor to elect what they think is the best strategy to come off with the result from their own point of view of their own.

Q. So it is a matter of employer strategy whether deciding a strike against one is a strike against all?

A. I suppose just as a union would decide to strike against one of a group, the form, as Mr. Sparlin testified, the purpose of striking one was to propose a contract for all. So it could be regarded as strategy or self-preservation, I think, the union, and the employers would have somewhat the same point of view.

Q. Well, that was the part I was interested in. It is a matter of engaging in strategy or resisting the efforts of the other party engaging in a dispute in the efforts of the other side, isn't that about what it gets down to?

A. Well, I don't know. Usually it is the view of the union, I assume, to try to achieve its result as quickly as possible without spreading the damage. I think the employers do likewise to get to a conclusion with the least possible confusion. [211]

Q. And in some cases—

A. And circumstances in some cases would deter-

(Testimony of J. Paul St. Sure.)

mine which is the better view. In the language of the act, whether it is better to endeavor to settle the matter by continuing joint negotiations, as the union desired to do here, or to break up the union, break up the authority of the union apparently did not desire to do.

Q. Now, a couple of factual matters as to your testimony concerning your consultations with the employers that you represented at the time or prior to June 4th. You testified, as I understood you, that at some point prior to June 4th, a certain charge was presented to the whole group, that is, the group of approximately 22 as to what course of conduct they individually would agree to take should there be a strike action by the union. At about what point was that, Mr. St. Sure?

A. My recollection of it is that it was during the last week in May, when it was brought up in the event the union elected to strike one, whether they would close or endeavor to keep on operating, or the struck store would—

Q. This would have been the last week in May?

A. That is my recollection.

Q. And did they respond at approximately that same time? A. Yes, sir.

* * * * * [212]

Q. Do you recall that a letter was sent to each of these employers who had given this notice to their employees on behalf of their employees asking that they be restored to their jobs; was anything done in re-

(Testimony of J. Paul St. Sure.)

sponse to that letter other than the reply which you sent, which also is in the record?

A. Well, I replied to you in response to that: assuming that you had represented as you now apparently now represent these people, stating that we regarded them as being on strike, therefore the question of severance was not there.

Q. Beyond the reply that is in the record you gave no, you or a individual, notice to the employee?

A. No.

Q. Nor to me nor to any representative of the union? A. Not that I recall of.

* * * * * [214]

Mr. Karasick: It is my understanding, Mr. Examiner, that it is stipulated by and between counsel for the respondents and counsel for the General Counsel that the following list showing the total employees and the employees within the jurisdiction of Local 1285, for each of the respondents involved in the consolidated complaint, is an approximate listing of such employees and that there may be a variant slightly one way or the other with respect to the following figures, but as of the present time, the best information available is as follows:

Redlick-Newman Company, total employees, 115; employees within the jurisdiction of Local 1285, 47. At Doyle Furniture Company, total employees, 6; employees within the jurisdiction of the Local, 1. At Davis Furniture Company, total employees, 6; [215] employees within the jurisdiction of the Local, 1;

at Mission Carpet and Furniture Company, total employees, 6; employees within the jurisdiction of the unit, 3. At Milwaukee Furniture Company, total employees, 8; employees within the jurisdiction of the Local, 1. At Wiley, total employees, 50; employees within the jurisdiction of Local 1285, 11. At San Francisco Furniture Company, total employees, 11; employees within the jurisdiction of Local, 4. At Lachman Brothers, total employees, 246; employees within the jurisdiction of the Local, approximately 50. At Sterling Furniture, total employees in San Francisco, 425; employees within the jurisdiction of the Local, 103. At Frank Newman Co., total employees, 30; employees within the jurisdiction of the Local, 6. At Shaff Furniture, total employees, 6; employees within the jurisdiction of the Local, 3; it being understood that these are figures relating to the employment personnel on June 4, 1949. Is that a correct statement, and do you so stipulate, Mr. St. Sure?

Mr. St. Sure: I will so stipulate.

* * * * * [216]

Trial Examiner Fitzpatrick: Very well.

JACK H. SPARLIN

was recalled by and on behalf of the charging party, and testified as follows:

Direct Examination

Q. (By Mr. Davis): Mr. Sparlin, on June 4, prior—withdraw that. On June 3 prior to the strike being called against the Union Furniture Company, if that company had offered a contract to you on

(Testimony of Jack H. Sparlin.)

the basis of the proposal that had already been made to Mr. St. Sure for the entire group, would your union have accepted that proposal and entered into a separate contract with the Union Furniture Company?

A. Well, I think if they had signed our proposal, yes, we would have.

Q. Now, after the strike was called, you recall that you sent a proposed supplemental agreement to the Union Furniture Company. If that proposed supplemental agreement had been agreed upon by the Union Furniture Company upon their receipt of it, upon the company's receipt of it, and they had executed that agreement, would you have called off your strike against [217] the Union Furniture Company? A. Yes.

Q. And you would have proceeded to operate under that contract with the Union Furniture Company alone?

A. Yes, if they had signed the contract.

Mr. Davis: That's all.

Cross Examination

Q. (By Mr. St. Sure): I believe you have already testified at certain times that the proposal was submitted to the Union Furniture Company after the strike. The Master Contract refers strictly to a modification of the 1948 agreement as the Master Contract. Isn't that correct?

A. That's right.

Mr. St. Sure: That's all.

(Testimony of Jack H. Sparlin.)

Redirect Examination

Q. (By Mr. Davis): Now, Mr. Sparlin, your method of conducting the affairs of the union is that all of the employers with whom you do business sign a contract which may be separately formed but identical in its terms, is that correct?

A. Well, yes.

Q. And you don't agree ordinarily to separate terms for separate employers, do you?

A. No, not at all.

Q. So that if you signed a contract with one employer, you insisted the terms of that contract apply to other employers, [218] even though the document you agreed to may be different?

A. That's right. [219]

* * * * *

In the United States Court of Appeals
for the Ninth Circuit

No. 12974

In the Matter of

DAVIS FURNITURE CO., et al.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, "In the Matter of Albert Leonard, Arnold Davis, Sidney Davis and William Gitzes, co-partners, jointly and severally d/b/a Davis Furniture Co., Case No. 20-CA-250, Doyle Furniture Co., Inc., a corporation, Case No. 20-CA-264, Lachman Bros., a corporation, Case No. 20-CA-252, Harry Frank, an individual, d/b/a Milwaukee Furniture Company, Case No. 20-CA-249, A. Eugene Pagano and M. de Castro, co-partners, jointly and severally, d/b/a Mission Carpet and Furniture Co., Case No. 20-CA-246, Frank Newman Co., a corporation, Case No. 20-CA-245,

Redlick-Newman Co., a corporation, Case No. 20-CA-247, Shaff's Furniture Co., a corporation, Case No. 20-CA-253, Joseph H. Spiegelman and Leon Spiegelman, co-partners, jointly and severally, d/b/a San Francisco Furniture Co., Case No. 20-CA-254, Sterling Furniture Company, a corporation, Case No. 20-CA-248, James F. Wiley and Verna M. Gardner, co-partners, jointly and severally, d/b/a J. H. Wiley The Furniture Man, Case No. 20-CA-251 and Carroll, Davis & Friedenrich, by Roland C. Davis," such transcript including the pleadings and testimony and evidence upon which the order of the Board in said consolidated proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Order designating J. J. Fitzpatrick Trial Examiner for the National Labor Relations Board, dated December 18, 1950.

2. Stenographic transcript of testimony taken before Trial Examiner Fitzpatrick on December 18, and 19, 1950, together with all exhibits introduced in evidence.

3. Charging parties' telegram, dated January 2, 1951, requesting extension of time for filing brief before the Trial Examiner.

4. Respondents' telegram, dated January 2, 1951, requesting extension of time for filing brief before the Trial Examiner.

5. General Counsel's telegram, dated January 2, 1951, requesting extension of time for filing brief before the Trial Examiner.

6. Copy of Chief Trial Examiner's telegram, dated January 4, 1951, granting all parties extension of time for filing briefs.

7. Copy of Trial Examiner Fitzpatrick's Intermediate Report, dated February 16, 1951 (annexed to item .. hereof); order transferring cases to the Board, dated February 16, 1951, together with affidavit of service and United States Post Office return receipts thereof.

8. Respondents' telegram, dated February 20, 1951, requesting permission to argue orally before the Board, (Denied, see Board's Decision and Order, dated May 3, 1951, page 2).

9. Exceptions to the Intermediate Report, received from Respondents and Intervenor on March 12, 1951.

10. Petition for permission to file brief amicus curiae or, in the alternative, to intervene, received from Employer Associations on April 24, 1951. (Denied, see Board's Decision and Order dated May 3, 1951, page 2, footnote 1.)

11. Copy of Board's Decision and Order issued by the National Labor Relations Board on May 3, 1951, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

12. Motion for leave to file brief as amicus curiae and to present oral argument, received from San

Francisco Employers Council on May 4, 1951, together with affidavit in support thereof.

13. Copy of Board's letter, dated May 4, 1951, denying the above request for permission to file brief as amicus curiae.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 25th day of July, 1951.

/s/ FRANK M. KLEILER,
Executive Secretary,
[Seal] NATIONAL LABOR RELATIONS BOARD

[Endorsed]: No. 12974. In the United States Court of Appeals for the Ninth Circuit. In the Matter of Davis Furniture Co., et al., Petitioners, vs. National Labor Relations Board, Respondent. Petition to Review and Petition to Enforce an Order of the National Labor Relations Board.

Filed: July 30, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of U. S. Court of Appeals and Cause.]

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Petitioners believing themselves to be aggrieved by a certain final order entered on the third day of May, 1951, by Respondent, National Labor Relations Board, herein called the "Board", in a proceeding against petitioners which appears and is designated on the records of the Board as The Matter of Davis Furniture Co., et al., and Carroll, Davis & Freidenrich, by Roland C. Davis, Case No. 20-CA-250, and consolidated cases, respectfully petition this honorable Court to review and set aside said order, and in support of their petition, respectfully show:

1. That the unfair labor practices in question were alleged to have been engaged in and were found by the Board to have been engaged in by petitioners in the City and County of San Francisco, State of California, in this Circuit;

2. That all of the petitioners transact business in the City and County of San Francisco, State of California, in this Circuit.

This Court therefore has jurisdiction of this petition.

Upon amended charges filed on or about the 27th day of November, 1950, by Roland C. Davis of the law firm of Carroll, Davis & Freidenrich, the General Counsel of the National Labor Relations Board,

on behalf of the Board, issued a consolidated complaint against petitioners alleging that petitioners had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) of the National Labor Relations Act.

Petitioners collectively filed an answer denying the commission of the unfair labor practices set forth in the complaint.

A hearing was held at San Francisco, California, on December 18 and 19, 1950, before J. J. Fitzpatrick, the duly designated Trial Examiner.

On February 16, 1951, the Trial Examiner, J. J. Fitzpatrick, issued his Intermediate Report containing findings of facts, conclusions of law and recommendations.

Petitioners filed timely exceptions to the Intermediate Report with the Board and requested oral argument. Petitions were also filed with the Board for leave to file briefs amicus curiae on behalf of a large number of employers associations engaged in multi-employer bargaining. All such petitions were denied and the Board, on May 3, 1951, issued its decision and order. Such decision and order are final and petitioners have no further remedy before the Board.

A copy of the Intermediate Report of the Trial Examiner and of the Decision and Order of the Board are annexed hereto and made a part hereof as though fully set forth herein.

Specifications of Errors and Statement of Points Relied On

The Order of the Board is in contravention of the Labor Management Relations Act, 1947; is erroneous, and is beyond the power of the Board. Said Order should be reviewed and set aside by this Honorable Court for the following reasons:

1. The economic lockout is the legitimate counterpart of the economic strike. The strike in this case involved only the economic issue of wages. The Board therefore erred in ruling that the lockout herein was an unfair labor practice.

2. In this case the union had accepted the employer group as an appropriate bargaining unit and there had been a history of bargaining by the union with the employer group on this basis.

Before, during and after the strike in this case the union insisted on dealing with the employers on the basis of this unit.

3. Admittedly and without contradiction, the evidence showed that

(a) The union called a strike against one member of the group with the objective of securing a master contract providing the wages that it desired from the association as a group.

(b) The other members of the bargaining group shut down with the objective of securing a master contract providing the wages that they desired from the union.

(c) At the time the employers shut down their employees were laid off and not discharged and were entitled to reinstatement without loss of seniority or other benefits or privileges upon termination of the labor dispute.

4. For the foregoing reasons the said Order is

(a) Contrary to law;

(b) Not supported by substantial evidence on the record considered as a whole;

(c) Contrary to the uncontradicted evidence;

(d) Contrary to and not supported by the findings of fact herein.

Wherefore, petitioners respectfully pray:

1. That said National Labor Relations Board be required to certify for filing with the Court a transcript of the entire record of said case.

2. That said Order of the Board be set aside in whole, and vacated and annulled, and that petitioners have such other and further relief as this Court may deem just and proper.

Dated: June 11, 1951.

DAVIS FURNITURE CO., et al.
/s/ By J. PAUL ST. SURE,
Attorney for Petitioners.

[Printer's Note: The Intermediate Report is set out at page 7, Decision and Order as page 47.]

[Endorsed]: Filed June 11, 1951. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO THE PETITION TO REVIEW AN ORDER

of the National Labor Relations Board, and the Request for Enforcement of Said Order

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, hereinafter called the Board, and, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 21 U.S.C., Supp. III, Secs. 151, et seq.), hereinafter called the Act, files this answer to the petition to review and set aside an order of the Board, and its request for enforcement of the Board's order.

1. The Board admits the allegations contained in paragraphs I and II of the petition for review (pages 1 and 2).

2. Answering the allegations contained in the "specifications of errors and statement of points relied on," the Board denies each and every allegation of error contained in paragraphs numbered I, IV, (a), (b), (c), and (d) thereof, also denies the allegations contained in paragraph II of the prayer for relief (page 4), and avers that its order is valid and proper in all respects.

3. Answering the allegations contained in paragraphs II, III, (a), (b), and (c) of petitioner's "specifications of errors and statement of points relied on" (page 3), the Board prays reference to the certi-

fied copy of the entire record of the proceedings before the Board, filed herein, for a full and exact statement of the pleadings, evidence, exhibits, rulings, findings of fact, conclusions of law, and order, of the Board, and all other proceedings had in this matter before the Board.

Wherefore, the Board respectfully prays this Honorable Court that said petition insofar as it prays that the Board's order be set aside, be denied.

Further answering, the Board, pursuant to Section 10 (e) and (f) of the Act, respectfully requests this Honorable Court for the enforcement of the Order issued by the Board on May 3, 1951, in the consolidated proceedings before it entitled:

In the Matter of Albert Leonard, Arnold Davis, Sidney Davis and William Gitzes, co-partners, jointly and severally d/b/a Davis Furniture Co., Case No. 20-CA-250; Doyle Furniture Co., Inc., a corporation, Case No. 20-CA-264; Lachman Bros., a corporation, Case No. 20-CA-252; Harry Frank, an individual, d/b/a Milwaukee Furniture Company, Case No. 20-CA-249; A. Eugene Pagano and M. de Castro, co-partners, jointly and severally, d/b/a Mission Carpet and Furniture Company, Case No. 20-CA-246; Frank Newman Co., a corporation, Case No. 20-CA-245; Redlick-Newman Co., a corporation, Case No. 20-CA-247; Shaff's Furniture Co., a corporation, Case No. 20-CA-253; Joseph H. Spiegelman and Leon Spiegelman, co-partners, jointly and severally d/b/a San Francisco Furniture Co., Case No. 20-CA-254; Sterling Furniture Company, a corporation,

Case No. 20-CA-248; James F. Wiley and Verna M. Gardner, co-partners, jointly and severally, d/b/a J. H. Wiley The Furniture Man, Case No. 20-CA-251. and Carroll, Davis & Friedenrich by Roland C Davis.

In support of this request, the Board respectfully shows:

(a) Each of the Petitioners herein is engaged in the retail furniture business in the City of San Francisco, tSate of California, within this judicial circuit. By virtue of Section 10 (e) and (f) of the Act, this Court has jurisdiction of the petition herein and of this request for enforcement.

(b) Upon proceedings in the consolidated cases before the Board, including the complaint, answer, hearing to receive evidence, intermediate report of the trial examiner and the exceptions filed thereto, as more fully shown by the certified record filed herewith, the Board, on May 3, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Petitioners (referred to in the Order as Respondents), their officers, agents, successors and assigns. The aforesaid order provides as follows:

* * * * *

[Printer's Note: The Order is set out in full at page 52 of this printed record.]

(c) On May 3, 1951, the Decision and Order was served by sending a copy thereof, post paid, bearing a Government frank, by registered mail, to Petitioners' counsel, St. Sure and Moore, Financial Center Building, Oakland 12, California.

(d) Pursuant to Section 10 (e) and (f) of the Act,

the Board is certifying and herewith filing a transcript of the entire proceedings before the Board, including the pleadings, evidence, findings of fact, conclusions of law and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this answer and request for enforcement, and of the certified record, to be served upon Petitioners, and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, evidence, and proceedings set forth in the said record, and upon so much of the order made therein as is set forth hereinabove, a decree denying the petition to be set aside and enforcing the order of the Board.

Dated at Washington, D. C., this 25th day of July, 1951.

/s/ A. NORMAN SOMERS,
Assistant General Counsel.

[Printer's Note: Appendix is set out in full at page 27.]

[Endorsed]: Filed July 30, 1951. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY PETITIONER

The Board has explicitly found:

1. That at no time did the union attempt to bargain on other than association-wide basis.

2. That the employees in this case were temporarily prevented from working by respondent's action in laying them off rather than discharging them.

Although the Board makes no explicit finding on this point, the evidence shows without contradiction that the sole issue between the parties and the cause of the strike was the economic issue of wages.

The union called a strike against one member of the group with the objective of securing a master contract providing the wages that it desired from the association as a group. The other members of the bargaining group shut down with the objective of securing a master contract providing the wages that they desired from the union.

The economic lockout by employers is the legitimate counterpart of the economic strike. The Board therefore erred in ruling that the lockout herein was an unfair labor practice.

The order of the Board is in contravention of the Labor Management Relations Act 1947; is erroneous, and is beyond the power of the Board. Said order

should be reviewed and set aside by this Honorable Court for the foregoing reasons.

Dated: August 8, 1951.

ST. SURE AND MOORE,
By /s/ J. PAUL ST. SURE.

[Endorsed]: Filed August 9, 1951.

PAUL P. O'BRIEN,
Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 12974

ALBERT LEONARD, et al., d/b/a DAVIS FURNITURE CO., et al.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

DECREE

Upon consideration of the petition of Albert Leonard, et al., filed June 11, 1951, to review and set aside an order of the National Labor Relations Board herein, filed May 3, 1951, and of the answer filed July 30, 1951, of said Board thereto, and its petition to enforce its said order, and of the transcript of record, briefs filed, and oral arguments made by counsel for respective parties,

It Is Ordered, Adjudged and Decreed by this Court that this cause be, and hereby is remanded to the said National Labor Relations Board to

determine its action on the evidence now before it, where as here there has been a temporary lockout which is not such a reprisal as found by the Board.

[Endorsed]: Decree. Filed and entered May 29, 1952.

PAUL P. O'BRIEN,
Clerk.

A True Copy:

Attest: June 24, 1952.

PAUL P. O'BRIEN,
Clerk.

United States of America

Before the National Labor Relations Board

Case Nos. 20-CA-250; 20-CA-264; 20-CA-252; 20-CA-249; 20-CA-246; 20-CA-245; 20-CA-247; 20-CA-253; 20-CA-254; 20-CA-248 and 20-CA-251

In the Matter of:

ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, Copartners, Jointly and Severally, d/b/a DAVIS FURNITURE CO., et al.

SUPPLEMENTAL DECISION AND ORDER

On May 3, 1951, the Board issued a Decision and Order in this case,[1] finding that the Respondents, herein also referred to as the Dealers, had discriminated in regard to the hire and tenure of employment of their employees in violation of

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[1] 94 NLRB 279.

Section 8 (a) (3) and (1) of the National Labor Relations Act, as amended, and ordering, among other things, that the Respondents make the employees whole for any loss of pay they had suffered by reason of such discrimination.

More specifically, the Board, in its Decision, found unlawful conduct of the Respondents, eleven furniture-dealing firms organized in a multiemployer organization, in temporarily locking out their employees, all of them members of a single labor organization, because employee-members of the same labor organization, employed by Union Furniture Company, another member of the same multiemployer organization engaged in a strike in the midst of collective bargaining negotiations on a multiemployer basis.

In its Decision, the Board concluded that "The layoffs thus served notice on all members of the bargaining unit, the laid-off employees as well as the strikers and nonstrikers, that resort to lawful protected concerted activity by the employees of any employer-member of the bargaining unit would subject other employee-members of the bargaining unit to the reprisal of a temporary loss of employment" and thus "The Respondents' conduct thereby directly interfered with, restrained, and coerced all the employees in the bargaining unit in the exercise of their rights guaranteed by Section 7 of the Act, in violation of Section 8 (a)(1)." The Board further concluded that "The layoffs also constituted discrimination in the hire and tenure of employment of the Respondents' employees be-

cause of the union-sponsored strike against Union Furntiure Company, thereby discouraging membership in the Union in violation of Section 8 (a)(3) of the Act." Finally, the Board found that "Whether the Respondents' conduct be viewed as a violation of Section 8 (a)(1) or of 8 (a)(3), * * * effectuation of the policies of the Act requires that the Respondents' employees be made whole. * * *"

A petition for review of this Decision was filed by the Respondents in the United States Court of Appeals for the Ninth Circuit. A cross-petition for enforcement of the Order was filed by the Board.

On May 29, 1952, the Court held that the evidence did not sustain the Board's finding that "the lockout was a mere reprisal against the Union Furniture Company strikers and the other employees aiding the strikers."[2] In reaching this conclusion, the Court cited evidence in the record that the purpose of the strike against Union Furniture Company was to undermine the bargaining power of the Dealers as a group, and thereby obtain more favorable contract terms from the Dealers, and that the purpose of the lockout was to defeat this strategy and protect the bargaining position of the employer-group.

The Court then stated:

> "Since we have held that the finding of the Board is not sustained by the evidence, the

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[2]Leonard et al., d/b/a Davis Furniture Co., et al., vs. N.L.R.B., 30 LRRM 2294.

> question arises whether we should determine if the Board's order may be sustained on the ground that it is illegal for the Dealers to use the temporary lockout as a counter-economic power to that of the strike in a dispute between employer and employee involving wages and labor conditions."

The Court reviewed the legislative history of the Taft-Hartley Act, particularly noting the various references therein to restrictions upon resort to "strikes and lockouts," and concluded:

> "From the above expressions in the statute and the linking of the terms 'strike' and 'lockout,' it is arguable that Congress has recognized strikes and lockouts as correlative powers, to be employed by the adversaries in collective bargaining when an impasse in negotiations is reached."

The Court, however, declined to resolve in the instant case the ultimate question of the legality of the lockout considered "as counter-economic power to that of the strike," but remanded the case to the Board for determination of that question upon the present record.

After carefully reviewing the entire record in this case in the light of the Court's opinion, and accepting the Court's finding that the lockout was not a mere reprisal for the strike, we are constrained to find, as we have before, that the lockout violated Section 8 (a)(1) and (3) of the Act.

As we read the Court's opinion, the sole question before us for consideration at this time is whether

the lockout by all the Dealers in this case was justifiable as a use of economic power to offset the Union's economic action in calling a strike against Union Furniture.

The identical question was recently considered by the Board in its Supplemental Decision and Order in the Morand case.[3] There, as in the instant case, the union, after reaching an impasse in negotiations with a multiemployer group, struck against one member of the group. Thereupon, as the Board found, all the members of the group discharged all of their employees who were members of the union, in violation of the Act. The majority[4] of the Board found further that even if the employees had not been discharged, but merely temporarily laid off in order to counteract the union's resort to a strike, the employers' action would still have been unlawful.

The reasons for our conclusion on this point in the Morand case apply with equal force here.

As we said there, a temporary layoff is unlawful "even if it were true that its purpose was to bring temporary economic pressure on the union and its

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[3]Morand Brothers Beverage Co., 99 N.L.R.B. No. 55. This Decision was rendered pursuant to a decree of the Court of Appeals for the Seventh Circuit remanding the case to the Board for findings on this point among others.
See Morand Bros. Beverage Co. vs. N.L.R.B., 190 F. 2d 576.

[4]Chairman Herzog did not join in this finding, reserving judgment thereon.

members solely in order to break the bargaining impasse."

It is not disputed that a discharge of the Dealers' employees in this case would have violated Section 8 (a)(1) and (3) of the Act,[5] the only question here being whether the temporary layoff in this case likewise violated the Act. But neither Section 8 (a)(1) nor Section 8 (a)(3) of the Act draws any distinction between a discharge and a layoff, but prescribes any interruption of the employment relation when directed against protected concerted activity. No limitation of this broad proscription is warranted unless clearly required by other sections of the Act.

There is no such clear requirement elsewhere in the Act. Section 8 (d)(4) does not expressly sanction lockouts. While it is arguable that, by forbidding resort to lockouts under certain circumstances, it impliedly recognizes a right to lockout under other circumstances, such an implication is not sufficient to overcome the positive and sweeping language of Section 8 (a)(3) and (1). Similarly, other provisions of the Act curtailing resort to lockouts (Sections 203 (c), 206, and 208 (a)) do not sufficiently demonstrate Congressional intent to strike down the safeguards of employees' rights in Section 8 (a)(3) and (1).

The Court in the instant case suggests that in view of the linking of the term "strike" and "lock-

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[5]See the Court decision in the Morand case, fn. 3, supra.

out'' in Sections 8 (d)(4), 203 (a), 206 and 208 (a) of the Act, it is arguable that Congress intended to equate lockouts with strikes as ''correlative economic powers.'' However, we note that in each instance referred to where ''strike'' and ''lock-out'' are linked, it is where particular strike activity is proscribed as unlawful; the specific inclusion of ''lockout'' in this context may well have stemmed only from a desire to emphasize even handed justice when union activity was being restricted. We find nothing in the Act which equates lawful strikes and lockouts. On the contrary, only the right to strike is expressly preserved by Congress in Section 13 of the Act. The absence of any similar express reservation of the right to lockout argues strongly against any intent to establish that right.

We reject the argument of our dissenting colleague that the lockout in this case does not violate the Act because the only purpose of the Dealers was, not to destroy the Union, but to destroy the threat to their bargaining position by defeating the strike.

The strike was clearly a form of concerted activity for the mutual aid and protection of the employees of Union Furniture, and the mass layoff of Union members in this case, depriving them of their means of livelihood for an indefinite period, in order to counteract the strike was necessarily designed to interfere with, restrain, and coerce the employees in the exercise of their right to strike, and to discourage membership in the Union which called the strike. Moreover, even in cases where

there was a lack of an intent to interfere with employee rights guaranteed by the Act, the principle has long been recognized that such absence does not excuse conduct which does in fact interfere.[6] The fact that the strike in this case threatened to impair the bargaining position of the Dealers or that the Dealers acted to protect their bargaining position affords no basis for distinguishing this strike from any other work stoppage permitted by the Act. It might be urged with equal force that a strike called by a union for recognition or to protest a grievance imperils the bargaining position of the employer, as, in each case, the purpose of the strike is, by its very nature, to undermine the employer's resistance to the Union's demands. It is not contended, however, that the employer in those cases would be privileged to defend his bargaining position (or "counteract" the strike) by a mass layoff of union members not involved in the strike. The only other basis suggested for distinguishing the strike in this case from other strikes is that it occurred after an impasse in bargaining. But, obviously, a strike does not cease to be a concerted activity merely because it occurs after an impasse, and any layoff of employees to counteract such a strike interferes with concerted activities to the same degree as if the strike had occurred before the impasse.

Our dissenting colleague further asserts that the Union "took the initiative in selecting the particu-

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[6]See, e.g., Le Tourneau Co. vs. N.L.R.B., 324 U.S. 793; Republic Aviation Corp. vs. N.L.R.B., 324 US. 793.

lar weapons of economic combat" and that the Employers did no more than defend themselves with "commensurate weapons" in their "attempt to resist, to do battle and to win."[7] Although this argument may have a superficial plausibility, it ignores the facts of economic life. The suggestion that the Union had a whole arsenal of weapons from which to choose is utterly unrealistic. When the impasse occurred, the Union had only one effective weapon—its ancient and protected right to strike.[8] Nor is the notion correct that strikes and lockouts are "commensurate weapons" in collective bargaining and that without the right of lockout an employer has no comparable economic weapon.[9] Faced with an impasse in bargaining, the employer still retains control of the terms of employment so long as production continues. He

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[7]We would agree that if the lockout here used is to be accorded the status of a lawful weapon against a protected strike, there is little question as to the "winner"—the strike is foredoomed.

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[8]" * * * unionism succeeds in collective bargaining only because it can threaten to strike." Hoxie, Trade Unionism in the United States, p. 190.

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[9]"But as methods of bargaining, these two [the strike and lockout] are not equivalent. To the employer the right to lockout is comparatively unimportant. He may use it to discipline an unruly set of employees, to discourage unionization in his factory, or to 'get the start' of his men. But in the usual bargaining he has no need of it. He can keep his factory gates open even though, at the same time, he may be reducing wages or refusing demands for higher wages. He is not forced to lock out and he can force his employees to strike or

is free to continue the existing terms without any contract, or, indeed, unilaterally to institute any previously proposed changes in those terms. These courses of action are obviously not available to the union. If the union resorts to an economic strike, the employer may lawfully meet the challenge by replacing the strikers. Thus, he may continue to operate on his own terms without any diminution of profits while the strikers suffer partial, if not complete, loss of wages. Even if the employer is unable to get replacements to permit continued operations in the face of the strike, he is generally in no worse position than the strikers. Both adversaries in the conflict would in such a case be under the same economic pressure to terminite the strike and restore the flow of wages and profits. We see no reason in equity or justice to give to employers the privilege of extending the hardship and deprivations of industrial conflict to areas not directly involved, nor could such a privilege be squared with the basic policy of the statute to minimize industrial strife and interruptions to commerce.[10]

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submit. Legislation which prohibits or restricts the lock out does not greatly weaken the bargaining power of the employer.

But to the employees there can be no collective bargaining without the right to strike." Commons-Andrews, Principles of Labor Legislation, p. 161.

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[10]Compare Setcion 8 (b)(4) of the Act, which implements this policy by forbidding unions to extend the area of industrial conflict beyond the plant of the primary employer.

Finally, there is no contention here that the Dealers could not have continued to operate without a contract or without assurance against being struck, so that this case does not fall within the rule of the Betts Cadillac case[11] and similar cases.

For all the foregoing reasons,[12] and upon the entire record in the case, we reaffirm our original decision and order herein.

Signed at Washington, D. C., September 5, 1952.

JOHN M. HOUSTON,
Member,

ABE MURDOCK,
Member,

PAUL L. STYLES,
Member,

[Seal] NATIONAL LABOR RELATIONS BOARD.

Paul M. Herzog, Chairman, dissenting:

Having reserved decision in the recent Morand case[13] on the issue which is more squarely before us here, I have reconsidered that issue in the light of the Courts' opinions in both the Morand and the

[11]Betts Cadillac Olds, Inc., 96 NLRB No. 46.

[12]As more fully explicated in Section II of our Supplemental Decision in Morand Brothers, 95 NLRB No. 55.

[13]Morand Brothers, 99 NLRB No. 55, at footnote 20 of the Supplemental Decision (1952).

Davis cases. These opinions impel me to conclude that, in this context, the majority errs in adhering to the view that this temporary lockout, motivated by a desire to counteract a union-directed stoppage rather than by an intent to interfere with concerted activity, constituted a violation of the amended Act.

Here the parties had reached an impasse, and it was the Union which took the initiative in selecting the particular weapons of economic combat. The Employers did no more than defend themselves with commensurate weapons; they refrained from using the ultimate, and to my mind unlawful, instrument of discharge. I am unwilling to infer a wish to destroy from an attempt to resist, to do battle and to win.

Signed at Washington, D. C.

PAUL M. HERZOG,
Chairman,

NATIONAL LABOR
RELATIONS BOARD.

In the United States Court of Appeals
for the Ninth Circuit

No. 13557

ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, Co-partners, Jointly and Severally, d/b/a DAVIS FURNITURE CO., et al.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, "In the Matter of Albert Leonard, Arnold Davis, Sidney Davis and William Gitzes, co-partners, jointly and severally d/b/a Davis Furniture Co., Case No. 20-CA-250, Doyle Furniture Co., Inc., a corporation, Case No. 20-CA-264, Lachman Bros., a corporation, Case No. 20-CA-252, Harry Frank, an individual, d/b/a Milwaukee Furniture Company, Case No. 20-CA-249, A. Eugene Pagano and M. de Castro, co-partners, jointly and severally,

d/b/a Mission Carpet and Furniture Co., Case No. 20-CA-246, Frank Newman Co., a corporation, Case No. 20-CA-245, Redlick-Newman Co., a corporation, Case No. 20-CA-247, Shaff's Furniture Co., a corporation, Case No. 20-CA-253, Joseph H. Spiegelman and Leon Spiegelman, co-partners, jointly and severally, d/b/a San Francisco Furinture Co., Case No. 20-CA-254, Sterling Furniture Company, a corporation, Case No. 20-CA-248, James F. Wiley and Verna M. Gardner, co-partners, jointly and severally, d/b/a J. H. Wiley The Furniture Man, Case No. 20-CA-251 and Carroll, Davis & Freidenrich, by Roland C. Davis," such transcript including the pleadings and testimony and evidence upon which the order of the Board in said consolidated proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

* * *

[See items 1 to 13 inclusive on pages 107-109 of this printed record.]

14. Copy of Supplemental Decision and Order issued by the National Labor Relations Board on September 5, 1952, together with affidavit of service and United States Post Office return receipts thereof. (See Volume IV.)

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set

his hand and affixed the seal of the Natoinal Labor Relations Board in the city of Washington, District of Columbia, this 4th day of November, 1952.

/s/ LOUIS R. BECKER,
Executive Secretary.

[Seal] NATIONAL LABOR RELATIONS BOARD.

[Title of Court of Appeals and Cause.]

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Petitioners believing themselves to be aggrieved by a certain final order entered on the 5th day of September, 1952, by respondent, National Labor Relations Board, herein called the "Board," in a proceeding against petitioners which appears and is designated on the records of the Board as the Matter of Davis Furniture Co., et al., and Carroll, Davis & Freidenrich, by Roland C. Davis, Case No. 29-CA-250, and consolidated cases, respectfully petition this Honorable Court to review and set aside said order, and in support of their petition, respectfully show:

1. That the unfair labor practices in question were alleged to have been engaged in and were found by the Board to have been engaged in by petitioners in the City and County of San Francisco, State of California, in this Circuit.

2. That all of the petitioners transact business in the City and County of San Francisco, State of California, in this Circuit.

This Court therefore has jurisdiction of this petition.

Upon amended charges filed on or about the 27th day of November, 1950, by Roland C. Davis of the law firm of Carroll, Davis & Freidenrich, the General Counsel of the National Labor Relations Board, on behalf of the Board, issued a consolidated complaint against petitioners alleging that petitioners had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended.

Petitioners collectively filed an answer denying the commission of the unfair labor practices set forth in the complaint.

A hearing was held at San Francisco, California, on December 18 and 19, 1950, before J. J. Fitzpatrick, the duly designated Trial Examiner.

On February 16, 1951, the Trial Examiner, J. J. Fitzpatrick, issued his Intermediate Report containing findings of fact, conclusions of law and recommendations.

Petitioners filed timely exceptions to the Intermediate Report with the Board and requested oral argument. Petitions were also filed with the Board for leave to file briefs amicus curiae on behalf of a large number of employers' associations engaged in multi-employer bargaining. All such petitions

were denied and the Board, on May 3, 1951, issued its decision and order.

Such decision and order being final and no further remedy being available before the Board, petitioners, on June 11, 1951, filed their petition to this Court to review and set aside said order of the Board. A cross-petition for enforcement of said order was filed by the Board. Briefs amicus curiae were filed on behalf of the parties by permission of the Court.

The matter having been duly heard, and all issues having been presented for its consideration, this Court, on May 29, 1952, rendered its opinion in the matter and decreed that the cause be remanded to the Board to determine its action, on the evidence previously adduced and then before it, where there has been a temporary lockout which was not such a reprisal as found by the Board.

On September 5, 1952, the Board issued its supplemental decision and order. Such decision and order are final and petitioners have no further remedy before the Board.

A copy of the supplemental decision and order of the Board, together with a copy of the decree issued by this Court in Case No. 12974, are annexed hereto and made a part hereof as though fully set forth herein.

Specifications of Errors and Statement of Points Relied On.

The Supplemental Order of the Board is in contravention of the National Labor Relations Act, as amended; is erroneous, and is beyond the power of the Board. Said order should be reviewed and set aside by this Honorable Court for the following reasons:

1. The Board has erred in its ruling that the temporary lockout employed by petitioners, motivated by a desire to offset or counteract a union directed work stoppage rather than by an intent to interfere with concerted activity, or to discourage membership in the union, constituted a violation of the National Labor Relations Act, as amended.

2. The Board has erred in adhering to the view that the Act prevents petitioners from resorting to the economic lockout, the recognized legitimate counterpart of the economic strike in a situation where collective bargaining on the economic issue of wages had reached an impasse and the union had already taken the initiative in resorting to the economic weapon of work stoppage in order to secure its demands.

For the foregoing reasons the said Supplemental Order is contrary to law, and contrary to and not supported by the findings of fact herein.

Wherefore, petitioners respectfully pray:

1. That said National Labor Relations Board be required to certify for filing with the Court a transcript of the entire record of said case.

2. That said Supplemental Order of the Board be set aside in whole, and vacated and annuled, and that the petitioners have such other and further relief as this Court may deem just and proper.

DAVIS FURNITURE CO., et al.
By J. PAUL ST. SURE,
Attorney for Petitioners.

Dated: September ...., 1952.

[Endorsed]: Filed September 26, 1952.

[Title of Court of Appeals and Cause.]

ANSWER OF NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW AND SET ASIDE ITS ORDER AND REQUEST FOR ENFORCEMENT OF SAID ORDER

To the Honorable the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141 et seq.) hereinafter called the Act, files this answer to the petition to review and set aside orders issued by the Board against Albert Leonard, Arnold Davis, Sidney Davis and William Gitzes, co-partners, jointly and severally, d/b/a Davis Furniture Co., Doyle Furniture Co., Inc., a corporation, Lachman Bros., a corporation, Harry Frank, an individual, d/b/a Milwaukee Furniture Company, A. Eugene

Pagano and M. de Castro, co-partners, jointly and severally, d/b/a Mission Carpet and Furniture Co., Frank Newman Co., a corporation, Redlick-Newman Co., a corporation, Shaff's Furniture Co., a corporation, Joseph H. Spiegelman and Leon Spiegelman, co-partners, jointly and severally, d/b/a San Francisco Furniture Co., Sterling Furniture Company, a corporation, James F. Wiley and Verna M. Gardner, co-partners, jointly and severally, d/b/a J. H. Wiley The Furniture Man, petitioners herein, and the Board's request for enforcement of said orders.

1. The Board admits the allegations contained in paragraphs 1 and 2 of page 2 of the petition to review.

2. With respect to the allegations contained in the remaining paragraphs appearing on page 1 and continuing through page 3 of the petition to review, the Board prays reference to the certified transcript of the record heretofore filed in the original proceeding in this Court, (No. 12974), and the supplemental certified transcript of record filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter.

3. The Board denies each and every allegation of error contained in paragraphs 1 and 2 of pages 3 and 4 of the petition to review.

4. Further answering, the Board avers that the

proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper under the Act, and pursuant to Section 10(e) of the Act, respectfully requests this Honorable Court for enforcement of its order issued against petitioner on May 3, 1951, and of its supplemental order dated September 8, 1952, in the proceedings designated on the records of the Board as, "In the Matter of Albert Leonard, Arnold Davis, Sidney Davis and William Gitzes, Co-partners, jointly and severally d/b/a Davis Furniture Co., Case No. 20-CA-250; Doyle Furniture Co., Inc., a corporation, Case No. 20-CA-264; Lachman Bros., a corporation, Case No. 20-CA-252; Harry Frank, an individual, d/b/a Milwaukee Furniture Company, Case No. 20-CA-249; A. Eugene Pagano and M. de Castro, co-partners, jointly and severally, d/b/a Mission Carpet and Furniture Co., Case No. 20-CA-246; Frank Newman Co., a corporation, Case No. 20-CA-245; Redlick-Newman Co., a corporation, Case No. 20-CA-247; Shaff's Furniture Co., a corporation, Case No. 20-CA-253; Joseph H. Spiegelman and Leon Spiegelman, co-partners, jointly and severally, d/b/a San Francisco Furniture Co., Case No. 20-CA-254; Sterling Furniture Company, a corporation, Case No. 20-CA-248; James F. Wiley and Verna M. Gardner, co-partners, jointly and severally, d/b/a J. H. Wiley The Furniture Man, Case No. 20-CA-251 and Carroll, Davis & Freidenrich, by Roland C. Davis."

5. Pursuant to Section 10 (e) and (f) of the Act, the Board has certified and filed with the

Court a transcript of the entire record in the proceedings before it.

Wherefore, the Board prays that the Court enter a decree denying the petition to review and enforcing in whole said order of the Board.

Dated at Washington, D. C., this 4th day of November, 1952.

/s/ A. NORMAN SOMERS,
Assistant General Counsel.
NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: Filed November 10, 1952.

[Endorsed]: No. 13557. United States Court of Appeals for the Ninth Circuit. Albert Leonard, Arnold Davis, Sidney Davis and William Gitzes, copartners, jointly and severally, doing business as Davis Furniture Co., et al., Petitioners, vs. National Labor Relations Board, Respondent, and National Labor Relations Board, Petitioner, vs. Albert Leonard, Arnold Davis, Sidney Davis and William Gitzes, copartners, jointly and severally, doing business as Davis Furniture Co., et al., Respondents. Transcript of Record. Petition to Review and Petition to Enforce an Order of the National Labor Relations Board.

Filed November 10, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 13557

In the Matter of

ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, Co-partners, Jointly and Severally, d/b/a DAVIS FURNITURE CO., et al.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

STATEMENT OF POINTS RELIED UPON BY PETITIONERS

Subsequent to the Decree rendered by this Court in proceeding No. 12974, the National Labor Relations Board has promulgated a Supplemental Decision and Order holding the Petitioners in violation of Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended, because they laid off their employees temporarily in an effort to counter the economic pressure exerted by the union and its members who had resorted to a work stoppage for the purpose of breaking a bargaining impasse on the economic issue of wages. The Board has declared: "After carefully reviewing the entire record in this case in the light of the Court's opinion, and accepting the Court's finding that the lockout was not a mere reprisal for the strike, we

are constrained to find, as we have before, that the lockout violated Section 8 (a) (1) and (3) of the Act." It is the Board's contention that such a temporary lockout is unlawful even if its purpose is to bring temporary economic pressure on the union and its members "solely in order to break a bargaining impasse."

Petitioners contend that the Board has erred in its determination that the National Labor Relations Act, as amended, prevents them from resorting to the economic lockout, the recognized legitimate counterpart of the economic strike, in a situation where collective bargaining on the economic issue of wages had reached an impasse and the union had already taken the initiative in resorting to the economic weapon of work stoppage in order to secure its demands.

The Supplemental Decision and Order of the Board is in contravention of the National Labor Relations Act, as amended, is not otherwise supported by law, is erroneous, and is beyond the power of the Board. Said Order should therefore be reviewed and set aside by this Honorable Court.

Dated: December 4, 1952.

ST. SURE AND MOORE,
By /s/ RICHARD B. McDONOUGH,
Attorneys for Petitioners.

/s/ GEORGE D. BAHRS,
Of Counsel.

Affidavit of service by mail attached.

[Endorsed]: Filed December 6, 1952.

No. 13,557

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of
ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, copartners, jointly and severally, d/b/a Davis Furniture Co.
DOYLE FURNITURE CO., INC., a corporation
LACHMAN BROS., a corporation
HARRY FRANK, an individual, d/b/a Milwaukee Furniture Company
A. EUGENE PAGANO and M. DE CASTRO, copartners, jointly and severally, d/b/a Mission Carpet and Furniture Co.
FRANK NEWMAN CO., a corporation
SHAFF'S FURNITURE CO., a corporation
JOSEPH H. SPIEGELMAN and LEON SPIEGELMAN, copartners, jointly and severally, d/b/a San Francisco Furniture Co.
STERLING FURNITURE COMPANY, a corporation
JAMES F. WILEY and VERNA M. GARDNER, copartners, jointly and severally, d/b/a J. H. Wiley the Furniture Man

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside Supplemental Decision and Order of the National Labor Relations Board After Decision by the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of
ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, copartners, jointly and severally, d/b/a Davis Furniture Co.
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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside Supplemental Decision and Order of the National Labor Relations Board After Decision by the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' OPENING BRIEF.

JURISDICTION.

This case is once more before this Court upon petition of the aggrieved employers to review the supplemental decision and order of the Board. At the original hearing this Court directed that the Board should in the first instance render its decision on the disputed question between the parties, namely, whether a temporary lockout which is not a reprisal is *per se* an unfair labor practice. The decision of the Board on this point is now appropriately before this Court for review and decision.

The Board has rejected the reasoning of the United States Court of Appeals for the Seventh Circuit in the *Morand Brothers* case and the reasoning of this Court embodied in its original opinion in the above-entitled case and has concluded that a lockout by the employers for the purpose of counteracting the effectiveness of the strike called by the union is, in and of itself, an unfair labor practice.

The Board rests its decision upon the following grounds: First, it reasons that because a *discharge* of the employees for engaging in concerted activities is an unfair labor practice, it therefore follows that a *temporary lay-off* of the employees to offset the effectiveness of a strike is *also* an unfair labor practice, the Board saying:

> "But neither Section 8 (a) (1) nor Section 8 (a) (3) of the Act draws any distinction between a discharge and a lay-off, but proscribes *any interruption* of the employment relation when directed against protected concerted activ-

ity. No limitation of this broad proscription is warranted unless clearly required by other sections of the Act." (Italics ours.)

This attempt of the Board to obliterate the distinction between a discharge and a lay-off is not supported by authority or by reason. There is the same distinction between a discharge and a temporary lay-off as there is between an employee's quitting his job and engaging in a strike. A strike is a concerted withholding of services from the employer for the purpose of inducing the employer to accede to demands of the strikers and with the intention of returning when the demands are met. A quitting is a complete, permanent and final severance of the employment relation between the parties. There is obviously the same distinction between a temporary lay-off or lock-out and a discharge of the employees.

From the inception of this case the petitioners have freely conceded that a *discharge* of employees for engaging in protected concerted activities is in and of itself an unfair labor practice. In fact this is the exact decision of the United States Court of Appeals for the Seventh Circuit in the *Morand Brothers* case. That Court, however, as did this Court, drew a distinction between a discharge and a temporary lay-off, which the Board persists in ignoring. For the convenience of the Court we reproduce here a portion of the opinion in the *Morand* case:

"Concluding, then, that the Union, unable to agree with the Associations upon a satisfactory

contract, had a right to strike against Old Rose, or, for that matter, any or all of the Associations' members, it becomes important to determine what retaliatory measures were available to petitioners. Old Rose, of course, had a clear right to replace its striking employees. *Labor Board v. Mackay Co.,* 304 U.S. 333, 345. The other petitioners, we believe, could quite properly and realistically view the strike, as they did, as a strike which, though tactically against but one petitioner, was, in the strategic sense, a strike against the entire membership of their Associations, aimed at compelling all of them ultimately to accept the contract terms demanded by the Union. It follows that they had a right to counter the strike's effectiveness by laying off, suspending or locking out their salesmen, who were members of the striking Union and as to whom there was not then in effect any collective bargaining agreement. We so hold, not merely on the basis of the implied recognition, in the 1947 Amendment to the Act, Section 8(d) (4), of the existence of such a right, but because the lockout should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the union, a corollary of the union's right to strike. Consequently, once petitioners had exhausted the possibilities of good faith collective bargaining with the Union through their Associations, any or all of them were free to exercise their right to lock out their salesmen without waiting for a strike, just as the Union was free to call a strike against any or all of them.

"In the instant case, however, the Board found that petitioners had not merely laid off or locked out but had discharged their employees. Although petitioners strenuously assert that this finding lacks substantial evidentiary support, they contend, in the alternative, that they had a right to discharge their employees when the Union struck Old Rose. With the latter contention we cannot agree; although it would seem that petitioners should be accorded the right to counter such a strike with a lockout, i.e., that they have a right to meet economic pressure exerted by the Union with economic pressure exerted on the Union, it is clearly settled that an employer's discharge of his employees because of their union affiliations or activities, strike activity included, is an unfair labor practice, violative of Section 8(a)(3) of the Act. *Labor Board v. Jones & Laughlin,* 301 U.S. 1; *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 183; *U.A.W. v. O'Brien,* 339 U.S., 454, 456-457."

It will be seen that the reasoning of the Board in its supplemental decision is a complete departure from the reasoning of the Court above set forth and also from the reasoning of this Court as set forth in its earlier opinion in this case.

The attempt of the Board to obliterate the distinction between a discharge and a lay-off cannot be supported by reason or by authority.

The Board's opinion in this case is inconsistent with the Board's own line of decisions frequently referred to as "the business necessity cases". To il-

lustrate the point we quote from the brief filed on behalf of the Board with this Court on the original hearing of this case at pages 16 and 17, reading as follows:

> "An employer faced with a threatened strike against himself may lawfully lock out employees if his motive in doing so is to protect his own economic interests. For example, in *Duluth Bottling Association,* 48 NLRB 1335, 1336, 1359-1360, the Board held that where a threatened strike against employers would result in a spoilage of their materials, the employers were entitled to guard against such loss by locking out their employees in anticipation of the strike. In *Betts-Cadillac-Olds, Inc.,* 96 NLRB 46; 28 LRRM 1509, the Board held that the union's refusal to tell employers when the threatened strike would occur warranted the employers in refusing to accept further orders and locking out their employees, since the employer's purpose was to guard against disappointing customers.
>
> "And in *International Shoe Co.,* 93 NLRB 159, 27 LRRM 1504, the Board held that an employer faced with the prospect of recurrent work stoppages which made it difficult for him to plan production, was entitled to lock out his employees where his purpose in doing so was to guard against economic loss."

We submit that this is a distinction without a difference. Furthermore, we submit that the Board is indulging in a species of judicial legislation. If the *strike* in each one of those cases was a *protected concerted activity,* and if the sweeping language of

the Board's supplemental opinion in this case is correct, namely, that Section 8(a)(1) and Section 8(a)(3) both proscribe *any interruption* of the employment relation when directed against protected concerted activity, then all these previous decisions of the Board are wrong.

The truth of the matter, of course, is that the Board is indulging in judicial legislation in reading into the statute its own ideas as to proper procedures to be followed by employers in the economic struggles arising out of impasses in collective bargaining, namely, that the lockout is legitimate to prevent spoilage of goods but is not legitimate to prevent the "whipsawing" described in the earlier opinion of this Court.

Next, the Board brushes aside the extended references in the opinion of this Court to the linking of the terms "strike" and "lockout" in Sections 8(d)(4), 203(a), 206, and 208(a), of the Act, and the suggestion of this Court that it is arguable that Congress intended to equate lockouts with strikes as "correlative economic powers". The Board reasons that the term "strike" and "lockout" are linked only where the particular activity is proscribed as unlawful and relies on the fact that no specific language can be found in the Act guaranteeing the right to lock out as the counterpart of the guarantee of the right to strike contained in Section 13 of the Act. The complete disregard by the Board of the entire legislative history of the Act is perhaps in and of itself the best illustration of the fallacious reasoning by which the

Board has concluded that the acts here involved are unfair labor practices. Where a statute provides a "cooling-off period" of sixty days and forbids either a strike or a lockout until the expiration of sixty days, it obviously contemplates that such acts may be done *after* the expiration of the sixty-day period. Otherwise, why have a waiting period at all? Only the most tortuous and illogical reasoning could arrive at the conclusion in the face of this language that the lockout was *per se* unlawful in any event. Such, of course, is not the case.

The Congress recognized that the lockout did in fact exist and was a recognized economic weapon in the conduct of collective bargaining negotiations, firmly established at common law and recognized by the Restatement of Torts, by many judicial opinions and by many non-legal experts and publications. (Petitioners' Opening Brief pp. 12-17.)

Congress also recognized, we believe, that Organized Labor itself considered that the lockout was and is the corollary and legitimate counterpart of the strike. (Petitioners' Opening Brief pp. 18-20.)

As further evidence of the recognition and acceptance of the lockout by Organized Labor itself we call the attention of the Court to the terms of the "Basic Steel Agreement" dated July 24, 1952, settling the gigantic steel strike which had paralyzed virtually the entire steel industry in the United States. Section 7 of the "Basic Steel Agreement" reads as follows:

> "New agreements to run to June 30, 1954, reopenable by either party as of June 30, 1953, on

> the subject of general adjustment of wage rates only, with the right to strike or lockout after June 30, 1953, upon appropriate notice."

The Board is apparently blissfully sleeping in its ivory tower while life, including the vigorous steel strike and the highly publicized settlement thereof, goes on about it.

The remainder of the opinion of the Board deals more with philosophical arguments rather than with interpretation or construction of the language of the statute. For this reason it will be discussed but briefly. The majority of the Board attempts to disprove the dissenting opinion filed by the chairman of the Board which declares that "the employers did no more than defend themselves with commensurate weapons in their attempt to resist—to do battle—and to win". In answer to this the majority opinion points out that the union has only one effective weapon—its ancient and protected right to strike—whereas, according to a majority of the Board the employer may lawfully meet the challenge by replacing the strikers. The majority opinion continues:

> "Even if the employer is unable to get replacements to permit continued operations in the face of the strike, he is generally in no worse position than the strikers. Both adversaries in the conflict would in such a case be under the same economic pressure to terminate the strike and restore the flow of wages and profits. We see no reason in equity or justice to give to employers the privilege of extending the hardship and depri-

> vations of industrial conflict to areas not directly involved, nor could such a privilege be squared with the basic policy of the statute to minimize industrial strife and interruption to commerce."

It is appalling to contemplate that the National Labor Relations Board, or rather a majority thereof, in this enlightened day and age of advanced, accepted, and civilized collective bargaining, solemnly declares that the only course which an employer or employer group may legitimately, legally, and appropriately follow in the case of a strike is to "break the strike" by means of replacing the strikers.

It is obvious that a successful breaking of the strike in this manner very often *would also break the union* in the plant of the employers. Yet this is what a majority of the Board stoutly insists is the *only legitimate* counterpart by the employer of the union's economic weapon of the strike.

To illustrate the disservice which a majority of the Board is doing to collective bargaining, we call the attention of the Court to the fact that a special commission was dispatched by President Roosevelt in 1938 to investigate industrial relations in Great Britain and in Sweden. The members of that commission discovered that in these countries, after going through virtually the same initial stages of strike breaking by replacing the strikers, both sides concluded, as the collective bargaining process reached maturity, that the better way to settle a dispute when an impasse was reached was to shut down and "sit it

out rather than to slug it out'' until an agreement was perfected. We particularly stress the fact that such was the conclusion of *both* sides, namely, both labor and management.

Illustrative of the conclusions reached by the President's commission, we quote paragraph 36 of the President's Commission's Report on Great Britain, and paragraphs 2 and 32 of the Commission's studies in Sweden:

> ''36. For the most part the conduct of strikes has been accompanied, at least since collective bargaining became generally accepted, by relatively little violence or provocation. In the case of strikes involving at the outset enough workers to make a continued operation of a plant impractical, employers almost invariably shut down their plants and do not attempt to operate until the controversy has been settled by negotiation. Several reasons for this practice were given us. In the first place, in the strongly organized industries it is difficult to obtain replacements, but even where organization is not extensive there is a general feeling among workers and employers that 'the job belongs to the man' and that it is not right for men to take, or to be asked to take, the jobs of their fellows. Secondly, collective bargaining having been generally accepted, there is confidence on both sides that the controversy will be settled by peaceful negotiations, and a desire on both sides to effect a resumption of work under circumstances as free from bitterness as possible, so that future strife maye be avoided.''

"The Commission's Studies in Sweden.

"2. For the most part employers in Sweden are organized to deal with labor matters in industry-wide associations. Most of these associations are members of the Swedish Employers Federation. The workers are organized in national unions, and these are members of the Swedish Confederation of Trade Unions. We conferred at length with the leaders of these two major organizations as well as with several leaders of national employers associations and of national unions. We also met with individual employers, both within and without these organizations."

"Employers Ban Strike-breakers.

"32. In 1931 there was a severe strike in the lumber region where strike-breakers were introduced. The military was called in and five deaths resulted. We were told by officers of the Employers Federation that this so shocked the people that no such attempt would again be made to use strike-breakers; and employers' representatives and union officials concurred in the opinion that unless there was a general strike against the government the military would not again be called out. In 1933 there was a strike in the building industry which lasted for nine months, but it was not accompanied by the use of strike-breakers or by violence. While we were in Sweden an extensive strike and lockout in the printing trade was under way, which the government conciliation machinery had not been able to settle. There had been no violence, and no one expected that there would be any. Although the dispute had been exhaustively examined by the govern-

> ment conciliators with whom we talked, there had been no proposal to arbitrate because, as we were informed, neither side would accept arbitration. The feeling seemed to be that the parties would find a correct settlement in due course."

It is ironic when employers in this area have been applauded for resorting to the lockout (which necessarily guarantees the right to return to work of all employees locked out) instead of resorting to the strike-breaking methods of replacing strikers, to be told by the National Labor Relations Board that the lockout is not a legitimate weapon and the only legitimate answer to a strike is to protect the strike by replacing the strikers and thereby *breaking the strike,* and, perhaps, the union.

We respectfully submit that neither the express language of Section 8(a)(1) and Section 8(a)(3) nor the philosophy of the legislation in which it is embodied requires such a conclusion.

This Court, while indicating its views on the matter so plainly as not to be misunderstood, has deferred to the Board in permitting the Board to make its decision in the first instance. It is respectfully submitted that the decision and opinion of the Board not only fails to reveal any reason why this Court should depart from its original ruling in this case, but the very illogic and impracticability of the reasoning in the Board's opinion demonstrates more conclusively than ever that the facts before the Court on this record do not constitute an unfair labor practice.

For the foregoing reasons petitioners respectfully pray that the request for enforcement of the order of the National Labor Relations Board be denied.

Dated, February 20, 1953.

Respectfully submitted,

ST. SURE AND MOORE,
Attorneys for Petitioners.

GEORGE O. BAHRS,
Of Counsel.

No. 13,557

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, copartners, jointly and severally d/b/a Davis Furniture Co., DOYLE FURNITURE CO., INC., a corporation, LACHMAN BROS., a corporation, HARRY FRANK, an individual, d/b/a Milwaukee Furniture Company, A. EUGENE PAGANO and M. DE CASTRO, copartners, jointly and severally, d/b/a Mission Carpet and Furniture Co., FRANK NEWMAN CO., a corporation, SHAFF'S FURNITURE CO., a corporation, JOSEPH H. SPIEGELMAN and LEON SPIEGELMAN, copartners, jointly and severally, d/b/a San Francisco Furniture Co., STERLING FURNITURE COMPANY, a corporation, JAMES F. WILEY and VERNA M. GARDNER, copartners, jointly and severally, d/b/a J. H. Wiley The Furniture Man,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside Supplemental Decision and Order of the National Labor Relations Board and Cross-Petition for Enforcement of Said Order After Decision by the United States Court of Appeals for the Ninth Circuit.

BRIEF OF MASTER FURNITURE GUILD, LOCAL NO. 1285, AS AMICUS CURIAE IN SUPPORT OF POSITION OF RESPONDENT AND CROSS-PETITIONER NATIONAL LABOR RELATIONS BOARD.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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On Petition to Review and Set Aside Supplemental Decision and Order of the National Labor Relations Board and Cross-Petition for Enforcement of Said Order After Decision by the United States Court of Appeals for the Ninth Circuit.

BRIEF OF MASTER FURNITURE GUILD, LOCAL NO. 1285, AS AMICUS CURIAE IN SUPPORT OF POSITION OF RESPONDENT AND CROSS-PETITIONER NATIONAL LABOR RELATIONS BOARD.

THE ISSUE.

In its opinion rendered upon remanding the instant case to the National Labor Relations Board for further action, this Court clearly defined the issue now here for resolution. The opinion stated:

> "Since we have held that the finding of the Board is not sustained by the evidence, the question arises whether we should determine if the Board's order may be sustained on the ground that it is illegal for the dealers to use the temporary lockout as a counter-economic power to that of the strike in a dispute between employer and employee involving wages and labor conditions." (Opinion, p. 5).

It must, however, be noted that this Court at another point in its opinion did inferentially characterize the issue in a somewhat different manner. Thus, first noting at some length the various references throughout the Labor Management Relations Act of 1947 to the use of the word "lockout," this Court said:

> "From the above expressions in the statute and the linking of the terms 'strike' and 'lockout', it is arguable that Congress has recognized strikes and lockouts as correlative powers, to be employed by the adversaries in collective bargaining when an impasse in negotiations is reached." (Opinion, p. 11).

In the expression first quoted above, this Court draws attention to "the temporary lockout as a *counter-economic* power to that of the strike in a dispute between employer and employee involving wages and

labor conditions" (emphasis added). In the portion of the opinion next quoted, attention is directed to the argument which considers the lockout in the sense of its being a *correlative power* to the strike.

The distinction between the lockout viewed (1) as a *counter-economic* power and (2) as a *correlative* economic power to that of the strike can be important when examined in the perspective of the statutory scheme and the record in the instant cause. We propose briefly to consider this distinction.

If the actual problem here presented was simply one of determining whether the lockout herein could, under the Act, be justified upon the assumption that the strike and lockout are perfectly "correlative" (i.e., mutual and reciprocal in all respects) powers, the answer would appear to be clear. Thus, there can be no doubt that an asserted power in the union to strike one employer because another employer has locked out his employees would, pursuant to Section 8(b)(4) of the Act, be rejected by this Court. Upon a basis of perfect parity, therefore, it would follow that a lockout by one employer in an effort to defeat a strike against another employer cannot be justified as the "corollary" to the "strike," as the latter is limited by the Act. The fact of the existence of the lockout as an employer instrument in industrial relations can be accepted as can the fact of the strike as a union weapon. Congress, as the Court notes in its opinion in this case, seems to have done so in certain general provisions of the Act just as it recognized the existence of the strike. However, by the acceptance of

strikes and lockouts as facts of industrial life, Congress did not thereby make all strikes or all lockouts legal. The recognition of a *general* right to lock out does no more to determine the legality of any *particular* lockout than does recognition of a general right to strike provide blanket immunity for any particular strike in question.

In the case of the strike it is obvious that the question of its legality can never be determined by simple reference to a Congressional "recognition" of the right to strike, but is always precisely a question of whether the particular strike under consideration runs afoul of Sections 8(b)(1), (2), (3), (4)(A), (4)(B), (4)(C), (4)(D), (5) and (6) of the Act. By parity of reasoning it seems clear that Congressional "recognition" of a general right to lockout, if in fact there be such recognition, cannot provide a key to a decision herein without reference to Sections 8(a)(1), 8(a)(2) and 8(a)(3) of the Act, wherein Congress stated with precision what in particular it has determined shall not be permitted to employers, either by means of lockout or otherwise.

And it must be noted that we are not, on the *record* herein, faced with the academic question of whether a general right to lockout has received Congressional recognition. The Board has found in the instant case, and the petitioning employers herein have admitted, that the lockout herein was conducted with the plain purpose and intent to "counter the effectiveness of the strike." Thus, the employers have admitted:

> "The only intent proven, or which could be found from the record in this case, is the intent of 'counter the effectiveness of the strike.' " (Petitioners' Reply Brief, Case No. 12,974, p. 23).

It is submitted that this Court squarely defined the issue actually presented by the record herein when it asked whether:

> " * * * the Board's order may be sustained on the ground that it is illegal for the dealers to use the temporary lockout as a counter-economic power to that of the strike in a dispute between employer and employee involving wages and labor conditions." (Opinion on Remand, p. 5).

The issue is whether the Board's finding of 8(a)(1) and (3) violations is sustained by the record and not whether Congress has recognized that there is such a thing in the arsenal of labor relations armament as a "lockout," undefined and unspecified as it may be in the statute. In other words, does the lockout, when used, as in this case, as an instrument to counter the effectiveness of protected concerted activities on the part of the union members, thereby become a particular kind of lockout which bears the stamp of illegality because of statutory regulation of such employer conduct?

THE VIOLATIONS OF SECTIONS 8(a)(1) AND (3) ARE NOT ONLY ESTABLISHED BY THE RECORD BUT ARE ADMITTED.

The Board in finding violations of 8(a)(1) and (3) has found in effect that the employers herein, by their lockout, did:

> (1) "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." (Sec. 8(a)(1)).
>
> (2) "by discrimination in regard to hire or tenure of employment * * * discourage membership in any labor organization." (Sec. 8(a)(3)).

The amazing, and somewhat startling fact, is that the petitioning employers herein have not at any point throughout these proceedings, either before the Board or this Court, argued that the lockout did not in fact *interfere with, restrain or coerce* the employees in their right to engage in protected activities. Petitioners have admitted that the strike against Union Furniture Company was in fact and in law a "protected"[1] strike (i.e., one in exercise of the rights guaranteed by Section 7 of the Act).

Nor has the Court upon an examination of the record herein found any reason to reject the Board's determination that the lockout herein did (indeed, was intended to) "interfere," "restrain" or "coerce" the employees in the exercise of rights guaranteed in Section 7 of the Act.

The correctness of this Court's finding to the effect that the lockout "was (not) a mere reprisal to defeat

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[1] "We are not concerned here with an illegal or non-protected strike." (Opening Brief, Case No. 12,974, p. 8.)

the strike against the individual member of the employers'' (Opinion, Case No. 12,974, pp. 3-4) is not here in question. Such finding did not in any way negate the Board's finding of ''interference,'' ''restraint'' or ''coercion''. That the lockout may be considered to have been motivated not simply as punishment of the employees because of the strike then in progress against Union Furniture, but rather as a blow against anticipated future strikes of the other employees or in support of the struck member employer, would compel the conclusion that it was not ''a mere reprisal.'' And this Court has so held (Opinion, Case No. 12,974, pp. 3-5). But the same considerations would in no way affect the determination that it was an ''interference'', ''restraint'' or ''coercion'' of the employees in the exercise of their Section 7 rights.

If the sole purpose of each of the locking out employers was no more than to lock out in anticipation of a strike personal to himself (which we do not concede) it seems evident that the finding of ''interference'', ''restraint'' or ''coercion'' is nevertheless obvious. That such future strikes would, if they had occurred, have been ''protected'' as was the strike against Union Furniture Company, is not denied. It will not, we believe, be suggested that an ''interference'' which rises to the level of a ''reprisal'' because directed at an existing exercise of Section 7 rights loses its quality of ''interference'' as well as its aspect of ''reprisal'' simply because directed at an anticipated *future* exercise of the

same rights. The Act was not designed with the limited goal of outlawing angry bursts of temper, but rather to insure that employees should not be subject to a economic pressure from their employers if they choose or desire to exercise the rights which Congress had decreed were vital to the nation's economic health. Whether the unlawful pressures are in *punishment* for completed activities or in *restraint* of future activities, they are alike forbidden.

The argument which petitioners make, therefore, recognizes, as it must, that "interference", "restraint" and "coercion" have in fact occurred. It seeks to assert, however, that such was nevertheless lawful because the "interference", "restraint" and "coercion" were indulged in not in a wanton spirit of revenge or reprisal, or in order to "bust the union," but solely to *"win," "resist"* or *"beat* the strike."[2]

Petitioners do not cite a single instance in which any Court[3] or the Board has held that "interference," "restraint" or "coercion" which would plainly be un-

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[2]Petitioners have stated this view repeatedly and in a variety of ways; e.g.,

> "In plain language, the General Counsel cannot or will not distinguish between an intent to resist a strike and an intent to 'bust a union'." (Pettiioners' Reply Brief, Case No. 12,974, p. 2.)

and again,

> "The *intent* of the employer here is to *win* the strike or to *resist* the strike or to *beat* the strike; or, as the Court of Appeals for the Seventh Circuit expressed it, 'to counter the effectiveness of the strike,' whatever choice of language is preferred. It is a legitimate maneuver and measure in labor relations and an inherent and integral part of collective bargaining. It is not an unfair labor practice." (Supra, p. 4.)

[3]With the exception of the United States Court of Appeals, 7 Cir. in *Morand Bros. Beverage Co. v. N.L.R.B.,* 190 F. (2d) 576.

lawful if part of an effort to "bust" the union, is nevertheless proper if confined to a program of "busting" the union's strike. Rather they argue generally that:

(1) The lockout is the lawful corrollary of the strike; that a strike is used to exert pressure on employers in order to bring them to terms, from which it follows that the lockout may be used against the employees in order to bring them to terms (i.e., to "beat" the strike).

(2) That without regard to the legal quality of the lockout as the corrollary of the strike, existing legal doctrine recognizes that a lockout maintained in support of an "economic interest" of the employer is lawful.

The notion that the *particular* lockout herein is not illegal because of Congressional "recognition" of lockouts *in general* has been discussed above. That we are not here concerned with the question of whether Congress has or has not recognized lockouts, but quite precisely with whether the particular lockout in question constitutes a violation of Sections 8(a)(1) and (3) of the Act seems obvious. Upon the admission that the lockout was intended to "interfere" with an admittedly protected strike (indeed was launched with the purpose of beating that strike) further consideration of petitioners' first ground of argument above noted is no longer required.

The question remains whether the literal violations of Sections 8(a)(1) and (3) were none the less ex-

cused upon the grounds suggested by petitioners. In this connection petitioners have argued that the same "business necessity" which, in the face of strikes or threat of imminent strike, has excused a lockout designed to prevent spoilage of merchandise (*Duluth Bottling Association,* 48 N.L.R.B. 1335), or to prevent disappointment to customers from failure to complete promised repairs (*Betts-Cadillac-Olds, Inc.,* 96 N.L.R.B. 46), or to avoid productional difficulties arising in a multi-operational plant struck in one department, is likewise sufficient to justify or excuse the strike herein (Petitioners' Opening Brief, pp. 6-7). They assert that efforts to distinguish the lockout herein from those in the cases noted are misdirected; that to do so is to find "a distinction without a difference" (Petitioners' Opening Brief, p. 6). But the open, obvious and extremely important practical statutory difference is not destroyed by the mere denial that such exists.

In each of the Board cases upon which petitioners rely the employer conduct being tested was aimed at a business condition or circumstance *created by* or *resulting from* the protected activities of the employees, rather than *employer conduct aimed at those activities themselves.* The obvious distinction was long ago made clear by the United States Supreme Court when it pointed out that an employer confronted with a strike may properly replace the striking employees *in order to continue in production* and just as clearly cannot lawfully do so *in order to defeat the strike* itself (*N.L.R.B. v. Mackay Radio & Telegraph Co.,*

364 U.S. 333, 345). Thus, the decisions in question recognize only that an employer may, in face of a protected strike, take reasonable steps in order to continue in production and if continued production becomes impossible or economically hazardous may shut down to avoid loss; they do not contain the slightest hint that the Act authorizes either step in order to "break," "resist" or "defeat" the strike itself.

The distinction here noted is identical to that which permits an employer, for bona fide business reasons, to remove his plant from one geographical area to another (*Trenton Garment Co.,* 4 N.L.R.B. 1186), but makes the identical conduct unlawful where the purpose is to defeat the exercise of rights guaranteed by Section 7 (*N.L.R.B. v. Montgomery Ward & Co., Inc.,* 107 Fed. (2d) 555).

Petitioners have admitted that the lockout in question would have been unlawful if conducted for the purpose of or with the intent to "bust (the) union" (Petitioners' Reply Brief, Case No. 12,974, p. 2). And we agree. But there is not one section of the Act controlling *"union busting"* and a different section permitting *"strike busting."* A lockout designed to "bust the union" is unlawful because it constitutes an "interference," "restraint" or "coercion" of the employees' rights guaranteed by Section 7. And a lockout designed to break a strike is unlawful for exactly the same reasons and through precisely the same statutory analysis. The right to strike is guaranteed by

Section 7 of the Act. The right to join, form or assist a labor union is guaranteed by the same very section. And each is protected from employer interference by Section 8(a)(1).

If petitioners are correct in their argument that they can use economic force against their employees to defeat the strike conducted by the union to which these employees belong because the employers have a right to protect their "competitive position" or because of their "economic" interest in winning the strike, it must follow inevitably that the same justification would support a lockout designed to "bust the union," for the statutory protection is identical in both cases.

Simply stated, petitioners' argument is that Congress cannot have intended to deprive the employer of all his historical weapons designed to defeat or counter a strike against him, and, therefore, has not restricted his historical right to lock out in order to give battle and win. But even petitioners do not have the temerity to suggest that the Act does not wholly and completely strip the employer of every one of his historical weapons designed to discourage unionization. And the plain fact is that if Congress by Sections 7 and 8(a)(1) has commanded that the employer may not interfere with or restrain the unionization of his employees, it follows inexorably that he is likewise forbidden to interfere with or restrain (i.e., "counter") their strike once they have organized. Both the right to organize and the right to strike are me-

morialized by Section 7. Each is by Section 8(a)(1) declared to be protected from all forms of employer interference. If this Court is to hold that the kind of "economic necessity" argued for by petitioners justifies interference with the one right, it must necessarily follow that both are lawfully subject to attack by means of the employer lockout.

If upon the record herein it had been found that petitioners locked out their employees not to counter a strike but simply in order to gain an acceptable contract, we should be faced with a problem of a somewhat different nature. (See, e.g., Concurring Opinion of Board Member Murdock in *The Matter of International Shoe Company,* 93 N.L.R.B 159, 27 L.R.R.M. 1504). That an employer who discontinues his operation because he cannot obtain terms from his employees upon which he is willing or able to continue operations, may do so without impairment of his employees' rights under Section 7 can be assumed *sub arguendo* insofar as the present proceedings are concerned. But that is not the instant case.

Petitioners, as the Board has found (see Supplemental Decision and Order, p. 9), had no concern with any problem of inability to operate without a union contract. They did not even have the problem of being unable or unwilling to operate at the wages then being paid, for those wages were less by ten dollars per month than they had offered to begin paying immediately (T. p. 13, lines 22-23, Case No. 12,974). But for the strike at Union Furniture Co. it is obvious that

petitioners would have been willing, indeed happy, to continue the *status quo,* thereby saving to themselves the ten dollars per employee raise which they had offered in bargaining. The lockout was initiated not because there was a difference between what the employees were willing to accept and what the employers were willing to pay, but simply because the employees of one employer struck in order to enforce their demands. The question of the legal right of an employer to lock out in support of *his demand* for a contract incorporating the terms he desires remains undetermined under the law. But no such question is raised upon the record herein. The Board has so found and petitioners admit as much when they seek to distinguish this case from the admitted unfair labor practice cases *upon the sole ground* that whereas a discharge is plainly unlawful, a temporary layoff is not. In this connection, petitioners say:

> "From the inception of this case the petitioners have freely conceded that a *discharge* of employees for engaging in protected concerted activities is in and of itself an unfair labor practice. In fact this is the exact decision of the United States Court of Appeals for the Seventh Circuit in the *Morand Brothers* case. That Court, however, as did this Court, drew a distinction between a discharge and a temporary layoff, which the Board persists in ignoring." (Petitioners' Opening Brief, p. 3, emphasis by Petitioners).

It is apparently the view of petitioners that employer conduct nicely calculated to "beat a strike"

is sanctioned if it stops short of conduct which could have no purpose other than to "break the union." Petitioners do not, and the opinion of the *Morand Brothers* case does not, point out wherein the statute forbids an attack upon the union as such, but authorizes and permits an attack upon the union's strike. The reason for such failure lies, we believe, in the obvious fact that there is no rationalization of the statute by which a temporary layoff can be condoned and a discharge (both being for the same identical ends) is condemned. There is no statutory magic by which the differences in degree of "interference" between a temporary and permanent cessation of employment can be held to render the one lawful and the other unlawful. And petitioners have never sought to spell out in the terms of the applicable sections of the Act how the result which they urge can be accomplished.

Petitioners have argued that a denial of the right to lockout in the circumstances of this case has the effect of throwing labor relations back to the vicious practice of importing strike breakers, etc., and that it, therefore, follows that the Board's order must be set aside (Petitioners' Opening Brief, p. 13). Their suggestion is as legally erroneous as it is practically and historically unsound. If the employees whose rights are here in question had been on "strike," it is obvious that a lockout directed at them would have been absurd and pointless. The Board's order if followed will not lead to a substitution of the technique of em-

ploying strike breakers for the technique of remaining closed while each side tests the economic strength of the other; on the contrary, it will, by preventing the sympathetic lockout, drastically limit the conditions under which such choice of technique arises. This fact is borne out by the experience of Great Britain and Sweden to which petitioners themselves allude (Petitioners' Opening Brief, pp. 10-13). It is clear from the study cited by petitioners that employers of these nations have neither felt the need to employ strike breakers nor the lockout as a weapon against their employees. Instead when a strike occurs they merely *shut down* and do not attempt to operate during the test of economic strength brought on by the strike. This is not a lockout instituted to beat a strike, but rather a refusal on the part of the employer to exercise the choice of creating industrial warfare by the importation of strike breakers once a strike of the employees has been called. In the one case the employees are willing to continue working and are restrained from doing so by a lockout as in the instant situation, and in the other case the employees have gone on strike and the employer simply elects not to operate until his employees return to work. The first situation represents an attack upon the employees and an interference with their tenure of employment, and the second demonstrates a complete absence of such interference.

More importantly, however, should it be noted that we are here confronted with a statute. Whether the

policy which it expresses accords with petitioners' notions of industrial fair play or wisdom is not the queston. It is an act plainly designed to equalize the bargaining power between employee and employer by throwing the weight of government into the scales upon the side of the employees.[4]

The argument that the original Act may have so far accomplished its purpose of nurturing the growth of healthy and stable unions that it would be a wise bit of policy to permit the employer to counter a strike such as here in question by general lockout, as he would have been free to do prior to the passage of the original Act, is a consideration for the attention of Congress which wrote the statute. Until Congress has amended Sections 7 and 8(a)(1) and (3), that argument has no proper bearing upon any problem before this Court. And this is the answer to the great bulk of petitioners' argument throughout this case. Petitioners could be entirely right that industry wide bargaining has laudable objectives, that "small" employers benefit economically through pitting their combined strength against the union of their employees, and that

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[4]Section 1 of the Act provides in part as follows:

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."

competitive conditions are stabilized through "master" contracts with labor. But these are arguments that should be addressed to Congress. They are neither germane to the problem of statutory interpretation here involved nor valid as considerations in judicial enforcement of an order of the National Labor Relations Board based upon findings of violation of specific provisions of the law in a particular case. The record in this case fully supports the Board's finding of interference, restraint and coercion within the meaning of Sections 8(a)(1) and (3) of the Act. No amount of justification of this illegal conduct on the part of petitioners on economic or social policy grounds can avoid this finding. Plainly, while the Act stands, the Board's order in this case should be enforced by a decree of this Court.

Dated, San Francisco, California,
March 27, 1953.

Respectfully submitted,
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By ROLAND C. DAVIS,
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No. 13,557

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of
ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS and WILLIAM GITZES, copartners, jointly and severally, d/b/a DAVIS FURNITURE CO.
DOYLE FURNITURE CO., INC., a corporation
LACHMAN BROS., a corporation
HARRY FRANK, an individual, d/b/a MILWAUKEE FURNITURE COMPANY
A. EUGENE PAGANO and M. DE CASTRO, copartners, jointly and severally, d/b/a MISSION CARPET AND FURNITURE CO.
FRANK NEWMAN CO., a corporation
REDLICK-NEWMAN CO., a corporation
SHAFF'S FURNITURE CO., a corporation
JOSEPH H. SPIEGELMAN and LEON SPIEGELMAN, copartners, jointly and severally, d/b/a SAN FRANCISCO FURNITURE CO.
STERLING FURNITURE COMPANY, a corporation
JAMES F. WILEY and VERNA M. GARDNER, copartners, jointly and severally, d/b/a J. H. WILEY THE FURNITURE MAN

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside Supplemental Decision and Order of the National Labor Relations Board.

PETITIONERS' REPLY BRIEF.

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Petitioners,

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside Supplemental Decision and Order of the National Labor Relations Board.

PETITIONERS' REPLY BRIEF.

On the original hearing of this case this Court in its opinion said:

> "* * * The question arises whether we should determine if the Board's order may be sustained on the ground that it is illegal for the dealers to use the temporary lockout as a counter-economic power to that of the strike in a dispute between employer and employee involving wages and labor conditions."

The case was remanded to the Board to determine "in the first instance" whether a lockout in such circumstances is legal.

The issue thus being narrowed, the General Counsel, at page 4 of his brief, sets forth the position of the Board as follows:

> "It is the Board's position that, where multi-employer negotiations have reached an impasse and the union strikes one of the employers in order ultimately to cause all the employers to accede to its terms, it is an unfair labor practice for the remaining employers to lock out their employees to counter the strike against one of them."

The opinion of the Board in the *Morand Brothers Beverage* case is reprinted in part as an appendix to the brief, and the General Counsel undertakes "analytically to highlight" the correctness of the reasoning of the Board in that opinion in the brief now before this Court.

The position of the Board and of the General Counsel is as follows: Collective bargaining carries with

it the right to strike. The right to strike is implicit in the process of collective bargaining.

As the General Counsel succinctly puts it (Br. p. 5):

> "Protection of the right to strike is indispensable to the effective exercise by employees of the right to bargain collectively. The union's economic demand at a bargaining table derives its ultimate sanction from the power of the employees to withhold their labor concertedly in its support. To the extent that efficacious resort to a strike is curtailed, the strength of the employees' bargaining position is likewise diminished."

The General Counsel thereupon proceeds to outline the concept of the Board and of the General Counsel as to what may appropriately take place during a strike. Such a strike is a queer, unreal economic bout in which the employer serves as a sort of economic punching bag or passive sparring partner for the union in a "contest" in which the union strikes all the blows at such times as it chooses and the employer is limited to picking himself up and binding up his wounds but may neither guard against a blow nor strike a blow in return because, says the General Counsel, such action would constitute "interference" with a protected concerted activity.

If the employer cannot operate without a contract, then and then only, may he engage in what the General Counsel terms a lockout. He may then shut down his business and be without income.

He must, however, be thinking only about *minimizing his own loss* and damage and may not contemplate

any detriment to the union resulting from his shutdown for if he did his act would be *intended* to interfere with a protected concerted activity.

The General Counsel points out at pages 8 and 9 of his brief that under the Board's concept of the law the union must at all times have the sole and exclusive *initiative* in determining *whether* the economic contest will commence, and, if so, *when,* for, as the General Counsel points out, if the employees may be locked out after an impasse has been reached they may be precipitated into an economic contest which may be unpropitious for them. Secondly, the union must at all times determine the *scope* of the strike and the employers may in no way be permitted to take from the union the control of the amount of labor which the union chooses to withhold, for, if the employer were so to do, the employees might be compelled to wage a larger strike than they are willing to undertake, which in turn might have an adverse effect on the union's ability to pay strike benefits.

The General Counsel concludes (Br. p. 9):

> "These drastic consequences clearly interfere with, impede, and diminish the right to strike."

The General Counsel declares that the employer has only two rights when an impasse in bargaining has been reached. First, the employer may unilaterally put into effect employment terms which the employees have finally rejected during the negotiations. (Br. p. 11.) And, second, the employer may shut down and suspend its operations but only *where he "cannot*

operate without a contract, or * * * without assurance that he will not be struck." (Br. pp. 8, 16 and 30.)

We mention in passing that the General Counsel and the Board concede that an employer has the right to undertake to operate his business *after* he has been struck. (This is a right incidentally announced by the Supreme Court of the United States in *N.L.R.B. v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, and not a right conferred upon the employer by the Board.) The General Counsel, at pages 13 and 14 of his brief, points out a number of actions which may be taken in aid of a struck employer who undertakes to operate in face of a strike. We will not dwell upon these however as we are concerned in this case only with the question whether an employer may lock out where a bargaining impasse has been reached.

In such a situation, namely, where an impasse has been reached, the Board in various ways declares that an employer *cannot intentionally exert economic pressure on a union in order to induce the union to modify its demands.*

We quote the Board as follows:

> "Neither Section 8 (a) (1) nor Section 8 (a) (3) of the Act draws any distinction between a discharge and a temporary layoff. The broad language utilized proscribes both permanent and temporary terminations of the employment relationship when directed against protected concerted activity. We are not free to cut down the broad proscriptions of Section 8 (a) (1) and 8 (a) (3) *so as to sanction lockouts which are designed to*

break a bargaining impasse by bringing economic pressure on employees who have engaged in collective bargaining, unless other sections of the statute clearly require it. We find no such requirement." (Br. p. 24.) (Italics ours.)

Again, the Board says:

"It may be urged that, in locking out to gain bargaining concessions, the employee (sic) is not motivated by a desire to interfere with union activity or membership. However, clearly, the resistance by a union, in the interest of the group, to the employer's demands, in the course of good-faith bargaining, is a form of concerted activity for the mutual aid and protection of the group as well as the exercise of the right to bargain collectively, and a mass layoff of union members, depriving them of their means of livelihood, in order to overcome such resistance necessarily is designed to interfere with such concerted activity and collective bargaining, and to discourage membership in the union which by its opposition to the employer's demands has provoked the layoffs. * * *" (Br. p. 28.)

Finally, the Board says:

"* * * We say only that the right of employees to adhere to a position taken by their union in good faith in collective bargaining is one of the most important rights protected by the Act, *that a temporary lockout which has as its purpose causing employees to recede from the bargaining position of their union is presumptively an interference with that right and violative of the Act.* This presumption is rebuttable, in our opinion,

> *only* by a showing that the employer *cannot operate without a contract,* or, as in the *Betts Cadillac* case, *without assurance that he will not be struck.*" (Br. pp. 29 and 30.) (Italics ours.)

Under the foregoing doctrine of the Board, when a bargaining impasse has been reached the union must have the sole initiative as to determining the time of, and the scope of, the strike. The union can continue working with or without a contract or may strike as and when it sees fit. The employer on the other hand is permitted to lock out only where he "cannot operate without a contract or without assurance that he will not be struck."

In the case of such employer lockouts the Board will require proof that it was in fact impossible for the employer to operate without a contract or without assurance that he would not be struck in order to test the honesty of the employer's motives in locking out. This reduces the situations in which an employer is entitled under the Board's rules to lock out to the single situation not only (1) where he *believes* that he cannot operate without a contract, but (2) where *in fact it is impossible* for him to operate. In this single case the Board accords the employer the right to lock out. The "right" to lock out in a situation where the employer is *unable* to operate is obviously meaningless and valueless.

Nevertheless the Board insists that the sixty-day "cooling-off period" in the statute was intended to apply to this single type of lockout.

We quote the Board as follows:

"* * * Multiple sanctions are not unknown to the law. So, the fact that lockouts during the 60-day cooling off period fixed in Section 8 (d) (4) constitute violations of Section 8 (a) (5), does not in our opinion preclude us from finding that such lockouts *also* violate Section 8 (a) (1) and (3) of the Act." (Br. p. 25.)

"But it is urged that, in expressly prohibiting lockouts during the 60-day period, Section 8 (d) (4) by indirection sanctions lockouts occurring after or before that period. If we accepted this view, we would indeed be letting 'the tail wag the dog.' We would be relying on a reference to 'lockouts,' in a context of restriction on their use, as a basis for exempting lockouts generally, or lockouts after a bargaining impasse, from the broad proscriptions of Section 8 (a) (1) and (3), thus limiting—if not virtually nullifying—the safeguards of employees' rights in that section." (Br. pp. 25 and 26.)

"It seems clear to us from a reading of Section 8 (d) (4) that the sole concern of Congress in enacting that provision, and the entire thrust thereof, was to discourage resort to self-help by both employees and unions during the sixty-day period and to induce them to bargain collectively during that period. It is understandable that, in seeking to underscore this purpose, Congress would specifically proscribe the most relevant forms of self-help—namely, strikes and lockouts. It follows from this view that Congress was not concerned at this point with the legal status of strikes and lockouts under other provisions of the

> Act but was solely desirous of insuring that, *whatever that status might be,* no strikes or lockouts would occur during the sixty-day period." (Br. p. 26.)

The Board is thus driven to the position that Congress prescribed a sixty-day "cooling-off period" for *illegal* lockouts as well as for legal lockouts.

Why Congress should prescribe a sixty-day cooling-off period for an illegal lockout is something of a mystery which the Board does not explain. The fact is, of course, that the sixty-day "cooling-off-period" is *a part of the statutory definition of the process of collective bargaining.* (Sec. 8 (d) (1) (2) (3) (4).) To argue that, in defining the process of collective bargaining Congress intended to include forbidden and illegal acts as a part of that process is to twist and distort the language of the statute beyond all reason.

The lockouts which Congress was referring to in its definition of collective bargaining were lockouts by employers for the purpose of bringing pressure on the union to recede from its demands, accept the employer's offer and conclude the collective bargaining process with a contract acceptable to the employers. No other rational meaning can be given the word "lockout" when used in this context.

The Board justifies its action in redefining the term "lockout" by reasoning that the word "lockout" could not have been intended to be used in the statute in its usual ordinary dictionary or common-law meaning

for to do so would tilt the economic scales too strongly in favor of the employer. (See Board's Br. pp. 28 and 29; also pp. 10 and 11.)

How the scales should be balanced in the economic contests between labor and management arising out of collective bargaining is a matter for the judgment of Congress. It is not the function of the Board to change the meaning of statutory language to accord to its own concept of fairness.

The General Counsel asserts that the matter of "whipsawing" has no place in the consideration of this case and argues that absent multi-employer bargaining, a strike at General Motors would not justify Chrysler in locking out its employees even though both companies are competitors and the settlement at General Motors might set the pattern for the industry. (Br. p. 12.)

The example given has no relation to the facts of this case. Admittedly, all employers involved here are and have been parties to a single multi-employer contract and have been accepted by the union as such. Admittedly, the union has struck one employer avowedly for the purpose of securing a single multi-employer contract favorable to the union on terms the union desires. The union proposes to strike one employer until such employer accepts the demands of the union and then in turn to strike another and another, ultimately winding up with a single uniform multi-employer contract. This is whipsawing. The employers are not strangers to one another as in the case of

Chrysler and General Motors, but are parties to the *same contract*. The concerted action they have taken is for the purpose of securing a single contract from the union.

Although it is true, as the General Counsel asserts at page 12 of his brief, that when employers bargain on a multi-employer basis they are considered a single employer for collective bargaining purposes, nevertheless it is perfectly obvious that each employer has his own business and customers and is subject to whipsawing. The entire group is in danger of capitulation of all its members, one by one, unless they have an effective counter-measure against the whipsawing.

The General Counsel reasons as follows (Br. p. 12):

> "The factor of 'whipsawing' is irrelevant for still another compelling reason. It is significant only on the view that petitioners' claimed collective vulnerability to a strike against a single employer entitles them to curtail its effectiveness by locking out their employees. But the effectiveness of a strike is no criterion of its protected character. Strikes are universally fashioned so as to impose the greatest pinch on the employer. The protection accorded strikers is not diminished because the pinch is exerted through exploitation of the competitive position of petitioners any more than it would be lessened because the pinch is exerted by calling a strike at the height of the season for the sale of an employer's products or at a time when a depleted labor market prevents the hire of replacements. It is the essence of strike strategy to take advantage of whatever inheres

> in the employer's situation which disables it from withstanding the pressure exerted. * * *"

This is another version of the "punching bag" concept of collective bargaining advanced by the Board and the General Counsel where all economic blows are struck by only one party. In other words, when an impasse is reached the union has the sole choice and determination as to when to impose the "pinch" on the employer either at the height of the employer's season or perhaps when the employer has his entire capital invested in a full supply of perishable products or when a depleted labor market prevents the hire of replacements. The General Counsel's concept of "protected" activities as protected by the Act gives the employer the choice of submitting to the union demands or of shutting down his establishment, but even here, *only* when he can prove that it is impossible for him to operate. If he shuts down before this time it is an illegal act. (See footnote Br. p. 16.)

The inflationary consequences of such a state of the law have already been mentioned in the earlier opinion of this Court.

We think it far more accords with common sense and with the legislative intent of Congress to permit the lockout to prevent the very process of whipsawing described by the Court. We cannot believe that Congress intended that such resistance to whipsawing constitutes an illegal interference with a protected, concerted activity.

In its zeal to protect and defend the rights of employees, we believe that the Board has stretched the meaning of Section 8 (a) (1) and 8 (a) (3) beyond reason.

The Act makes it an unfair labor practice to interfere with the concerted activities of employees or to discourage membership in the union. We think that the only fair or reasonable interpretation to be given these sections is to limit them to acts of employers designed to *interfere with the right of employees to have a union.*

They were never intended as a guaranty that unions should win all strikes. They were never intended to make it illegal to resist a strike or to exert economic pressure on employees to modify their demands. This is the fundamental mistake of the Board. So long as the employer does not try to "bust" the union, the economic pressures he can exert on the union to facilitate arriving at a mutually satisfactory contract are part of the rough-and-tumble process of collective bargaining. They are the economic counterpart of the strike.

This Court having requested the Board to decide this matter in the first instance, and the Board having done so, this matter is now submitted to this Honorable Court for its opinion for the guidance not only of the employers and employees involved in this case but for the guidance of the vast multitude of employers and employees engaged in multi-employer bar-

gaining on the Pacific Coast and throughout the United States.

The enforceability of the Board's order is solely within the discretion of this Honorable Court. Section 10 (e) and (f) of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., Supp. V, Sec. 151 et seq.); *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 504; *National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395, 410, 411.

CONCLUSION.

Enforcement of the Board's order should be denied, and petitioners' request that said order be set aside should be granted.

Dated, San Francisco, California,
April 24, 1953.

Respectfully submitted,
ST. SURE AND MOORE,
Attorneys for Petitioners.

GEORGE O. BAHRS,
Of Counsel.

No. 13559

United States
Court of Appeals
for the Ninth Circuit.

serial 2774

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

ALASKA STEAMSHIP COMPANY and AMERICAN RADIO ASSOCIATION, C.I.O.,

Appellees.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-10-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

A. NORMAN SOMERS,

Assistant General Counsel, National Labor Relations Board,

Washington, D. C.,

For Petitioner, National Labor Relations Board.

JAY A. DARWIN, ESQ.,

68 Post Street,

San Francisco, California,

For Respondent, American Radio Association, CIO.

BOGLE, BOGLE & GATES,

J. TYLER HULL,

Central Bldg.,

Seattle 4, Wash.

For Respondent, Alaska Steamship Co.

BASSETT & GEISNESS,

JOHN GEISNESS,

811 New World Bldg.,

Seattle, Wash.,

For Horace W. Underwood.

Form NLRB—501.

United States of America—National Labor Relations Board

AMENDED CHARGE AGAINST EMPLOYER

Case No. 19-CA-277.
Date Filed: 1/17/50. Amended 3/20/50.
Compliance Status Checked by:

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge is Brought:
   Name of Employer: Alaska Steamship Company.
   Address of Establishment: Pier 42 North, Seattle, Washington.
   Number of Workers Employed: Approximately 1000.
   Nature of Employer's Business: Steamship operation.
   The above-named employer has engaged in and

is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (2) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.):

On various dates since November 21, 1949, the Alaska Steamship Company has refused to employ Horace W. Underwood to encourage membership in American Radio Association, CIO, in violation of Section 8 (a) (3) of the Act;

By executing and giving effect to a contract dated December 3, 1948, between the American Radio Association, CIO, and the Alaska Steamship Company, the Alaska Steamship Company has assisted American Radio Association in violation of Section 8 (a) (2) of the Act;

By the above acts and by other acts and statements, the Alaska Steamship Company has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge: Horace W. Underwood.

4. Address (Street and number, city, zone, and State): Vashon, Washington. Telephone No. Black 1231.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization).

6. Address of National or International, if any (Street and number, city, zone, and State). Telephone No.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ HORACE W. UNDERWOOD,
Individual.

Date: March 17, 1950.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

Received March 20, 1950.

Form NLRB-508

United States of America
National Labor Relations Board

Case No. 19-CB-90

AMENDED CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Date Filed: 1-17-50.
Amended: 1-22-51.
Compliance Status Checked by:

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an Original and 4 Copies of This Charge With the NLRB Regional Director for the Region in Which the Alleged Unfair Labor Practice Occurred or Is Occurring.

1. Labor Organization or Its Agents Against Which Charge Is Brought.
   Name: American Radio Association, CIO.
   Address: Arcade Building, Seattle, Wash.
   The Above-Named Organization(s) or Its Agents Has (Have) Engaged in and Is (Are) Engaging in Unfair Labor Practices Within the Meaning of Section (8b) Subsection(s) (1) (A) and (2) of the National Labor Relations Act, and These Unfair Labor Practices Are Unfair Labor Practices Affecting Commerce Within the Meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.):
   Since on or about December 1, 1949, and continuing thereafter down to the date of the exe-

cution of this charge, American Radio Association, CIO, has attempted to cause, and has caused Alaska Steamship Company to discriminate against Horace W. Underwood, in violation of Section 8(a)(3) of the Act, by refusing to employ him as a radio officer aboard any of its vessels, all in violation of Section 8(b)(2) of the Act.

Since on or about December 3, 1948, Alaska Steamship Company, among others, entered into a labor agreement with American Radio Association, CIO, which said agreement accords preference in employment to members of said American Radio Association, CIO, which provisions are illegal and void because they impose conditions upon employment more restrictive than those permissible under Section 8(a)(3) of the Act, and because no election has been held pursuant to the provisions of Section 9(e)(1) of the Act.

Since on or about May 15, 1949, American Radio Association, CIO, has promulgated and administered shipping rules and assignment lists which have been maintained and administered by and for the benefit of members of American Radio Association, CIO, and thereby discriminated against non-members of American Radio Association, CIO, all in violation of Section 8(b)(1)(A) of the Act.

By the above acts and other acts and statements, American Radio Association, CIO, has restrained and coerced employees of Alaska

Steamship Company, in the exercise of the rights guaranteed in Section 7 of the Act.

3. Name of Employer: Alaska Steamship Company.

4. Location of Plant Involved: Pier 42, Seattle, Wash.

5. Nature of Employer's Business: Steamship company.

6. No. of Workers Employed: Variable.

7. Full Name of Party Filing Charge: Horace W. Underwood.

8. Address of Party Filing Charge (Street, City, and State): Vashon, Wash. Tel. No.: Vashon 3235.

9. Declaration:

I Declare That I Have Read the Above Charge and That the Statements Therein Are True to the Best of My Knowledge and Belief.

By /s/ H. W. UNDERWOOD.
(Signature of Representative or Person Making Charge.)

Date: Jan. 22, 1951.

Wilfully False Statements on This Charge Can Be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 1001).

Received January 22, 1951.

United States of America, Before the National Labor Relations Board, Nineteenth Region

Case No. 19-CA-277 and Case No. 19-CA-358

In the Matter of:

ALASKA STEAMSHIP COMPANY

and

HORACE W. UNDERWOOD (an Individual).

Case No. 19-CB-90 and Case No. 19-CB-135

AMERICAN RADIO ASSOCIATION, CIO,

and

HORACE W. UNDERWOOD (an Individual).

CONSOLIDATED COMPLAINT

It having been charged by Horace W. Underwood, an individual, that Alaska Steamship Company and American Radio Association, CIO, have engaged in and are engaging in certain unfair labor practices affecting commerce as set forth in the Labor Management Relations Act of 1947, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of said Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 5, as amended, Section 203.15, hereby issues this Consolidated Complaint and alleges as follows:

I.

Alaska Steamship Company, hereinafter called

Respondent Alaska, is a Washington corporation, having its principal office and place of business in Seattle, Washington, where it is engaged in the operation of ocean-going vessels for the transportation of persons and cargo between ports in the United States and ports in the Territory of Alaska. During the preceding 12-month period it has operated approximately 15 ocean-going cargo or passenger or combination vessels, and has realized, from the transportation of cargo and passengers in interstate commerce, revenue in excess of $100,000.00.

II.

Respondent Alaska at all times material hereto has been and is now an employer within the meaning of Section 2 of the Act, and has been and is now engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

III.

American Radio Association, CIO, hereinafter called Respondent Radio, at all times material hereto has been and is now a labor organization within the meaning of Section 2, subsection (5) of the Act.

IV.

Respondent Radio at all times material hereto has maintained and does now maintain its principal office and place of business in the City of New York, New York, and has operated and does now operate a branch office for the conduct of its business in the City of Seattle, Washington.

V.

On or about December 3, 1948, Respondent Alaska entered into a labor agreement with Respondent Radio, wherein, among other things, it was provided that:

"Section 1.

"Employers agree to recognize the Association as the authorized collective bargaining agent for all radio officers employed by the employers, and when filling vacancies preference of employment shall be given to members of the Association.

"Section 2.

"The names of all unemployed members of the Association shall be placed on the Association's unemployed lists at the various offices of the Association. The offices of the Association shall be the central clearing bureaus through which all arrangements in connection with the employment of radio officers shall be made.

"Section 3.

"(b) * * * employers recognize that it has been the practice for [radio officers] to offer themselves for employment through the Association offices, and consequently, * * * the employers agree to secure all radio officers within the classifications covered by this agreement from and through the offices of the Association."

VI.

On or about July 14, 1950, Respondent Alaska and Respondent Radio entered into an amendment

to said agreement referred to in paragraph V above which, among other things, provides:

"Section 2.

"The employers shall employ and continue in their employment on board their vessels, radio officers procured from the list of unemployed radio officers on file at the nearest employment office of the Association.

"When filling vacancies all radio officers shall produce official assignment clearance from the Association employment office.

"Section 3.

"The employers agree, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Association 30 days after the effective date of this clause or 30 days after date of hiring, whichever is later.

"The foregoing clause shall become effective when the Association shall have been certified by the National Labor Relations Board as provided by Section 8(A) and (3) of the Amended Act, or when such certification shall no longer be required, whichever is sooner."

VII.

The preferential employment provisions contained in the agreement as described in paragraph V above, and in the amendment described in paragraph VI above, and any renewals or continuations of either, are illegal and void because they impose conditions upon employment more restrictive than those permissible under Section 8(a)(3) of the

Act and because no certification of a referendum authorizing the entry into of an agreement requiring membership in Respondent Radio as a condition of employment, has ever issued pursuant to the provisions of Section 9(e)(1) of the Act.

VIII.

From January 31 to February 6, 1949, shipping rules for marine radio officers were proposed, promulgated, and adopted by Respondent Radio and became effective on or about May 15, 1949, which, at all times since, have been and now are in full force and effect. Said shipping rules, among other things, provide:

"Rule 1.

"It is the policy of the union that the membership shall be offered employment through the branch offices of the union in accordance with the principle of rotary hiring.

"Rule 3.

"The term 'member' or 'membership' as used in these rules shall mean a full book member or members in good standing in the American Radio Association.

"Rule 4(a).

"A national assignment list shall be maintained by the union. Such list shall be posted in each branch office of the union.

"Rule 4(c).

"The assignment list shall be considered con-

fidential and shall not be divulged in whole or in part to any non-member of the union."

IX.

Pursuant to the terms of the agreement described in paragraph V above, and the amendment described in paragraph VI above, and the provision of the shipping rules as described in paragraph VIII above, at all times material hereto, Respondent Radio and its Seattle Branch have maintained and administered assignment lists.

X.

On or about December 1, 1949, Horace W. Underwood, hereinafter called Underwood, did execute and deposit at the Seattle Branch office of Respondent Radio an active assignment list application form.

XI.

On or about April 16, 1950, and December 12, 1950, Underwood did make further application for placement on the active assignment list maintained and administered by Respondent Radio and did request information whether his written application described in paragraph X above had resulted in according him placement on Respondent Radio's shipping lists, or whether if so placed on any shipping lists maintained and administered by Respondent Radio what numerical placement had been accorded his application. In each instance Respondent Radio, pursuant to the provisions of its shipping rules, refused to inform said Underwood in either respect.

XII.

On or about December 23, 1949; December 29, 1949; April 2, 1950, and May 25, 1950, said Underwood requested of Respondent Alaska employment as a radio officer aboard ships operated by Respondent Alaska.

XIII.

At all times since December 23, 1949, and more particularly on or about January 6, 1950; February 2, 15, and 24; March 3, 9, 16, and 17; April 16; May 20; June 25 and 30, 1950, and at other times, which times are peculiarly within the knowledge of Respondent Alaska, Respondent Alaska has manned and sailed its vessels from the Port of Seattle, Washington, employing radio officers among its licensed personnel.

XIV.

At all times since on or about December 1, 1949, Respondent Radio has refused and thereafter has continued to refuse to dispatch Underwood to Respondent Alaska or any other requesting employer to available radio officer positions for which the said Underwood at all times has been and is now fully qualified to discharge.

XV.

As a result of the actions of Respondent Radio as described in paragraph XIV above, Underwood has been denied employment as a radio officer by Respondent Alaska.

XVI.

By entering into the agreement and its amendment as described in paragraphs V and VI, respectively, above; by adopting, promulgating, and administering shipping rules as described in paragraph VIII above; by maintaining and administering assignment lists pursuant to said shipping rules; and by refusing to dispatch Underwood as described in paragraph XIV above, Respondent Radio has caused and is now causing employers, and more particularly respondent Alaska, to discriminate against their employees, and more particularly Underwood, in regard to hire and tenure of employment and to encourage membership in Respondent Radio in violation of Section 8(a)(3) of the Act, and thereby Respondent Radio has engaged in and is now engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

XVII.

By all of the acts of Respondent Radio as set forth and described in paragraphs V, VI, VIII, IX, XIV, XV, and XVI above, and by each of said acts, Respondent Radio has restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all of said acts and by each of them, Respondent Radio has engaged in and is now engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

XVIII.

By entering into the contract and its amendment

as described in paragraphs V and VI, respectively, above; by acquiescing in and assenting to a practice of obtaining radio officers only from Respondent Radio [whereby Respondent Radio], pursuant to its assignment lists which are maintained and administered pursuant to its shipping rules, Respondent Alaska permits Respondent Radio to control the dispatching of radio officers, and in the course of which control Respondent Radio refused to dispatch Underwood as described in paragraph XIV above, Respondent Alaska interfered with, restrained and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act, and has discriminated and is now discriminating against their employees, and more particularly Underwood, in regard to hire or tenure of employment, and thus encouraged and now is encouraging membership in Respondent Radio, and thereby engaged in and is now engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

XIX.

The activities of Respondent Alaska and Respondent Radio as set forth and described in paragraphs V through XVIII, inclusive, occurring in connection with the operations of Respondent Alaska as described in paragraphs I and II above. have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States, and have led to and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 22nd day of January, 1951, issues this Consolidated Complaint against Alaska Steamship Company and American Radio Association, CIO, the Respondents herein.

[Seal] /s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
19th Region.

Before the National Labor Relations Board

[Title of Causes.]

ANSWER OF ALASKA STEAMSHIP COMPANY

Comes now the respondent Alaska Steamship Company, and for answer to the complaint admits, denies and alleges as follows:

1.

Admits the allegations contained in the first sentence of Paragraph I of the complaint; admits that during the preceding 12-month period this respondent has operated ocean-going cargo or passenger or combination vessels, and has realized, from the transportation of cargo and passengers in interstate commerce, revenue in excess of $100,000.00; and denies each and every other allegation contained in Paragraph I of the complaint.

2.

Admits the allegations of Paragraphs II and III of the Complaint.

3.

This respondent is without knowledge of the allegations contained in Paragraph IV of the Complaint.

4.

Admits that on or about December 3, 1948, Pacific American Shipowners Association, on behalf of its member companies, including this respondent, entered into a labor agreement with respondent Radio, and that said agreement contained certain sections, including Sections 1, 2 and 3, portions of which sections are correctly quoted in Paragraph V of the Complaint, and denies each and every other allegation contained in said Paragraph V.

5.

Admits that on or about July 14, 1950, and effective April 28, 1950, the Pacific Maritime Association (successor to Pacific American Shipowners Association), on behalf of its member companies, including this respondent, entered into an agreement amending the agreement referred to in Paragraph V of the Complaint, and that said amendment contained certain sections designated Section 2 and Section 3, a portion of which sections is correctly quoted in Paragraph VI of the Complaint, and denies each and every other allegation contained in said Paragraph VI of the Complaint.

6.

Denies each and every allegation contained in Paragraph VII of the Complaint,

7.

This respondent is without knowledge of the allegations contained in Paragraphs VIII through XI, both inclusive, of the Complaint.

8.

Denies each and every allegation contained in Paragraph XII of the Complaint.

9.

Admits that at various times since December 23, 1949, vessels operated by this respondent have sailed from the Port of Seattle, Washington, and that personnel designated as radio officers have been employed aboard said vessels, and denies each and every other allegation contained in Paragraph XIII of the Complaint.

10.

This respondent is without knowledge of the allegations contained in Paragraph XIV of the Complaint.

11.

Denies each and every allegation contained in Paragraphs XV through XIX, both inclusive, of the Complaint.

12.

The Post Office address of this respondent is Pier 42, Seattle 4, Washington, and for the purpose of these proceedings is in care of Edward G.

Dobrin, 603 Central Building, Seattle 4, Washington.

Wherefore, it is prayed that the Complaint herein be dismissed.

ALASKA STEAMSHIP
COMPANY,

By BOGLE, BOGLE & GATES,

EDWARD G. DOBRIN,

J. TYLER HULL,
Its Attorneys.

Duly verified.

Received January 31, 1951.

Before the National Labor Relations Board

[Title of Causes.]

ANSWER OF AMERICAN RADIO ASSOCIATION

Comes now the American Radio Association, CIO, and for its answer alleges:

I.

Admits the allegations of the Complaint marked III, IV, V, and VI.

II.

Has no knowledge or information to form a belief thereof as to allegations marked I, II, XII,

and XIII, and on that ground denies each and every of the allegations therein contained.

III.

Denies each and every of the allegations contained in paragraphs VII, VIII, IX, X, XI, XIV, XV, XVI, XVII, XVIII and XIX.

Wherefore, the respondent, American Radio Association, CIO, prays that the Complaint be dismissed.

/s/ JAY A. DARWIN,
Attorney for American Radio Association, CIO, Respondent.

Duly verified.

Received February 2, 1951.

Before the National Labor Relations Board

[Title of Causes.]

ORDER CONSOLIDATING CASES AND NOTICE OF HEARING

Charges and Amended Charges pursuant to Sections 8(a) and 8(b) of the National Labor Relations Act, 61 Stat. 136, having been filed by Horace W. Underwood, an individual, copies of which charges are hereto attached, and the undersigned having duly considered the matter and deaming it necessary in order to effectuate the purposes of the Act and to avoid unnecessary costs or delay,

It Is Hereby Ordered, pursuant to Section 203.33 of the National Labor Relations Board Rules and

Regulations, Series 5, as amended, that these cases be and they hereby are consolidated.

Please Take Notice that on the 26th day of February, 1951, at 10:00 a.m., in Room 523, Smith Tower, Seattle, Washington, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Consolidated Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You Are Further Notified that, pursuant to Section 203.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an Answer to the said Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

In Witness Whereof the General Counsel of the National Labor Relations Board on behalf of the Board, has caused this Consolidated Complaint and Order Consolidating Cases and Notice of Hearing to be signed by the Regional Director for the Nineteenth Region on this 22nd day of January, 1951.

[Seal] /s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
19th Region.

[Admitted in evidence February 27, 1951, as General Counsel's Exhibit No. 1.]

Before the National Labor Relations Board

[Title of Causes.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon charges duly filed by Horace W. Underwood, herein called the Complainant, the General Counsel of the National Labor Relations Board,[1] by the Regional Director for the Nineteenth Region (Seattle, Washington), issued a consolidated complaint dated January 22, 1951, against Alaska Steamship Company, Seattle, Washington, herein called the Company, and American Radio Association, CIO, Seattle, Washington, herein called the Union, and jointly called the Respondents, alleging that the Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and (2), respectively, and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the complaint, accompanied by an order consolidating the cases and notice of hearing, and copies of the respective charges, were duly served upon the Respondents.

---

[1]The General Counsel and the attorney representing him at the hearing are referred to as the General Counsel. The national Labor Relations Board is referred to as the Board.

With respect to the unfair labor practices, the complaint alleged in substance that: (a) on December 3, 1948, the Respondents entered into an agreement, later amended by an agreement of July 14, 1950, each of which provided that the Company would obtain its marine radio officers through the facilities of the Union and also contained preferential employment provision, which were illegal and void because of the failure to satisfy the requirements in the proviso to Section 8 (a) (3) of the Act, both as to the conduct of a union-shop election and the permissible limits of union security provisions; (b) since about May 15, 1949, the Union has had in effect certain shipping rules for radio officers, pursuant to which the Union has maintained and administered assignment lists, restricting to members of the Union referrals to positions with the Company and other employers; (c) notwithstanding application by Horace W. Underwood, a radio officer, to the Union for placement on its assignment lists, and to the Company for employment, the Union refused to dispatch Underwood to the Company or other employers for available positions as a radio officer; and (d) by said acts and conduct, the Union violated Section 8 (b) (1) (A) and (2) and the Company violated Section 8 (a) (1) and (3) of the Act.

On January 31, 1951, the Company filed its answer, admitting certain allegations of the complaint concerning its corporate structure and business activities. The answer admitted also that on December 3, 1948, the Company, through Pacific American

Shipowners Association, and on July 14, 1950, through its successor, Pacific Maritime Association, acting on behalf of their member companies, had entered into labor agreements with the Union, but the answer denied that the Company had engaged in unfair labor practices. On February, 1951, the Union filed its answer, admitting that it was, and had been, under contractual relationships with the Company, but denying that it had engaged in unfair labor practices.

Pursuant to notice, a hearing was held on February 26 and 27, and March 26 to 28, 1951, inclusive, at Seattle, Washington, before the undersigned Trial Examiner duly designated by the Associate Chief Trial Examiner. The General Counsel, both Respondents, and the Complainant were represented by counsel, and all participated in the hearing. Full opportunity to examine and cross-examine witnesses and to introduce evidence pertinent to the issue was afforded all parties. At the opening of the hearing, the General Counsel moved to amend the complaint in a minor respect, and the motion was granted. The Union moved to strike certain allegations of the complaint, which motion was joined in by the Company. It was taken under advisement by me and later denied. The Company moved, and the Union joined therein, to dismiss the allegations of the complaint that the contract of July 14, 1950, was unlawful per se, upon the ground that the alleged unlawful provisions therein had been approved in substance by the Board in another proceeding involving other parties, and this motion

was taken under advisement. The Company also moved, with the Union joining in, that the complaint be dismissed insofar as it alleged that the execution of the agreement of December 3, 1948, had been unlawful, upon the ground that no timely charge had been filed. This motion was granted upon that and an additional ground, as will appear in the discussion of the contracts below. On the second day of the hearing, the General Counsel moved to amend the complaint in several respects, particularly to allege that the Company violated Section 8 (a) (3) by its failure to employ Underwood after his application to the Company for employment, and to allege also that the Company, by its alleged acts and conduct above recited, violated Section 8 (a) (2) of the Act. This motion was granted over the Respondents' objections. Upon motion of the Respondents, the hearing was adjourned until March 26. When the hearing resumed, the Respondents moved that their respective answers be deemed amended to deny the new allegations, and these motions were granted. The Company, with the Union joining therein, renewed its motions above stated to dismiss certain allegations of the complaint, and my rulings were as before. At the close of the hearing, the General Counsel moved to conform the pleadings to the proof as to minor matters, and this motion was granted without objection. Each Respondent moved to dismiss the complaint upon the ground that there had been a failure of proof, and the Company renewed its

motion to dismiss the allegation that the contract of July 14, 1950, was unlawful per se. These motions were taken under advisement, and are disposed of in accordance with the determinations below. The parties did not avail themselves of an opportunity to argue orally, but there was a brief discussion of the issues on the record. Pursuant to leave granted, the Respondents and the Complainant filed briefs.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Company

Alaska Steamship Company, a Washington corporation with its principal office and place of business in Seattle, is engaged in the operation of ocean-going vessels for the transportation of persons and cargo between ports in the United States and ports in the Territory of Alaska. During the year 1950, the Company's revenue from its business activities exceeded $100,000. There is no dispute, and I find, that the Company is engaged in commerce within the meaning of the Act.

II. The Union

American Radio Association, CIO, is a labor organization admitting to membership employees of the Company.

III. The Unfair Labor Practices

A.

Preliminary Statement

The Company is a member of Pacific Maritime Association, herein called PMA, and was a member of PMA's predecessor, Pacific American Shipowners Association, herein called PASA. These associations, neither of which is a party to this proceeding, represented their member companies in collective bargaining negotiations with the Union. This case involves a contract between PASA and the Union, dated December 3, 1948, and the Union's applicable shipping rules governing assignments of radio officers to available positions under principles of "rotary hiring," a system based essentially upon hiring in rotation with an effort to distribute the work equally. The legality of that contract was in issue in Pacific Maritime Association, 89 NLRB 894. The succeeding contract between PMA and the Union, dated July 14, 1950, and executed after the Board's decision in the cited case, is also involved here along with the Union's revised shipping rules, both of which were in effect at the time of the hearing herein. The December 3, 1948, contract is herein called the 1948 agreement. The later contract is called the 1950 agreement. The complaint alleges that each agreement was unlawful per se and in its administration. Additionally, we have alleged discrimination against Horace W. Underwood, a radio officer who sought employment with the Company during the lives of the two agreements. First we

shall consider the issues concerning the agreements and the Union's shipping rules, and next the issues involving Underwood.

B.

The Agreements and the Union's Shipping Rules

1. The 1948 Agreement.

On December 3, 1948, PASA and the Union executed a collective labor agreement which, in part, was as follows:

Preference of Employment

Section 1. Employers [Member Companies of PASA] agree to recognize the Association [Union] as the authorized collective bargaining agent for all Radio Officers employed by Employers and when filling vacancies preference of employment shall be given to members of the Association.

Hiring

Section 2. The names of all unemployed members of the Association shall be placed on the Association's unemployed lists at the various offices of the Association. The offices of the Association shall be the central clearing bureaus through which all arrangements in connection with the employment of Radio Officers shall be made. For the purposes of promoting safety of life and property at sea, and to guarantee as far as is practical equal distribution of work among all members of the Association, the parties hereto agree that vacancies shall be filled in the following manner: Preference shall be given the Radio Officer longest unemployed who

can present proof of previous employment and/or experience on a job or jobs similar to that which is offered, and who in the judgment of the Employer is qualified, competent, and satisfactory to fill the job.

When any Radio Officer is rejected, the Employers shall furnish a statement in writing to the Association stating specifically the reason why he is not qualified, competent, and satisfactory to fill the job.

* * *

Discrimination

Section 3 (a). The Employers agree not to discriminate against any member of the Association for legitimate union activity.

Section 3 (b) of the contract provided certain substitute procedure for employment of radio officers by the Member Companies of PASA in the event that the above-quoted provisions were "suspended in any way as a result of legal action * * *," which substitute provisions were to be applicable during negotiations for "provisions complying with the law."

2. The Union's Applicable Shipping Rules.

The Union's shipping rules, correctly termed "National Marine Assignment Rules," which were adopted in early 1949 and were effective thereafter during the life of the 1948 agreement are quoted in part below. In order to facilitate an understanding of the changes later made in the rules, certain wording is emphasized. The rules provided:

Rule 1. It is the policy of the Union that the membership shall be offered employment through the Branch offices of the Union in accordance with the principle of rotary hiring. * * *

Rule 3. The term "member" or "membership" as used in these Rules shall mean a full book member or members in good standing in the American Radio Association.

National Assignment List

Rule 4 (a). A National assignment list shall be maintained by the Union. Such list shall be posted in each Branch office of the Union.

Rule 4 (c.) The assignment list shall be considered confidential and shall not be divulged in whole or in part to any non-member of the Union.

Registering on List

Rule 5 (a). All members desiring to obtain employment shall register for the assignment list and shall be designated as Active [available for employment] for a specific Branch office of the Union.

Assignment List Forms

Rule 6 (a). A member registering on the Assignment List shall fill out in full an Assignment List Application Form provided by the Union.

Assignment Procedure

Rule 7. All Active members shall be offered employment in rotation, in accordance with the following basic procedure:

1. The Port Assignment Committee shall first offer employment to the member registered on the Assignment List who is designated as active at the Branch Office and whose number is lowest in numerical order of the Assignment List (the highest in shipping seniority) * * * If such member shall accept the offered employment the member shall be issued clearance to the job.

2. If the member who has been offered employment in accordance with (1) hereof shall refuse such offer of employment or shall not answer such offer within a reasonable time, the Assignment Committee shall offer such employment to the member whose number is next lowest in numerical order of the Assignment List and who is designated as Active.

3. The procedure described in (1) and (2) hereof shall be continued until such time as the Assignment Committee shall secure a member who will accept the offered employment. [Entire emphasis supplied.]

The shipping rules also provided the method for compilation of a national assignment list each week. Members of the Union obtaining employment had their names transferred from the "Active" column to the "Employed" column, and in practice were dropped 30 places on the list. For each week of employment, in a permanent or temporary job, a member's number on the succeeding weekly list was increased by 30, thereby causing him to progress toward the bottom of the lists. Unemployed members moved upward to the place formerly held by members who had secured employment.

3. The 1950 Agreement.

On June 3, 1949, PMA replaced PASA.[2] On April 28, 1950, the Board issued its decision in the Pacific Maritime case, holding that the execution of the 1948 agreement had been violative of Section 8 (a) (1) by PASA because of the provision granting preference in hiring to members of the Union. The Board found "it unnecessary to consider either the closed-shop or the hiring-hall aspects of this contract." There is some dispute whether the Respondents acted under a contractual relationship until the new agreement was executed, but I believe it is unnecessary to recite the details. It is sufficient to say that the Company continued to obtain its radio officers through the Union.

After the decision in the cited case, PMA, representing the Company and its other members, and the Union began negotiations for a new agreement. The Union also undertook to revise its shipping rules. On July 14, the Union and PMA executed the 1950 agreement, retroactively effective to the date of the decision in the cited case. The new agreement recited that the 1948 agreement, and certain "Supplementary Agreements" not here in issue, were "reinstated with all rights and benefits accruing to the parties" and that the 1948 agreement was to "be continued until its expiration date [June 14, 195—, with a renewal provision from year to year]," with certain amendments described below. Section 1 of the 1948 agreement, entitled

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[2]This date is taken from the findings in Pacific Maritime Association, above cited.

"Preference of Employment," was amended to read:

Recognition

The Employers agree to recognize the Association as the authorized and exclusive bargaining agent for all Radio Officers employed by the Employers.

Section 2, entitled "Hiring," was amended to read:

The Employers shall employ and continue in their employment on board their vessels Radio Officers procured from the list of unemployed Radio Officers on file at the nearest employment office of the Association [Union].

For the purpose of promoting safety of life and property at sea and to guarantee as far as practical equal distribution of work among Radio Officers, vacancies shall be filled in the following manner:

Preference shall be given to the Radio Officer longest unemployed who is qualified, competent and satisfactory and who can present proof of previous employment on vessels of one or more of the companies under agreement with the Association and who has worked as Radio Officer on U. S. flag vessels during the two-year period immediately preceding signing of this agreement and who has experience on a job similar to that which is offered.

The Association agrees to maintain, administer and operate its employment offices and to apply the aforementioned preferences in accordance with the law and assumes sole responsibility therefor.

When filling vacancies all Radio Officers shall produce official assignment clearance from the Asso-

ciation employment office. When any Radio Officer is rejected for employment, the company shall furnish a statement in writing to the Association employment office stating specifically the reason why he is not qualified, competent or satisfactory to fill the job. In the event the Association employment office is unable to furnish a Radio Officer to fill a vacancy, the provisions of this section shall be waived in such cases and the company shall be free to fill vacancies from other sources, and the Association employment offices thereupon notified.

The Employers agree not to discriminate against any member of the Association because of Union activity or because of race, creed or color.

The Association agrees that no applicant or prospective employee shall be discriminated against because of membership or non-membership in the Association or by reason of race, creed, color or national origin.

Section 3, entitled "Discrimination," was amended to read:

Association Security

The Employers agree, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Association thirty (30) days after the effective date of this clause or thirty (30) days after date of hiring, whichever is later.

The foregoing clause shall become effective when the Association shall have been certified by the National Labor Relations Board as provided by

Section 8 (a) and (3) [sic] of the amended act, or when certification shall no longer be required, whichever is sooner.

4. The Union's Revised Shipping Rules.

During June, 1950, the membership of the Union at its various port offices adopted new shipping rules. The adoption in Seattle was on June 21, and they became effective there simultaneously with the new agreement with PMA. These rules need not be quoted extensively. Reference may be made to the earlier rules above quoted, particularly to the emphasized wording there. The new rules provide for a continuation of rotary hiring, with assignments to be in rotation in an effort to spread available work among the applicants. No distinction is made between members and non-members in placement on the assignment lists. The words "membership" and "members" were deleted from the earlier rules, and the words "Radio Officer(s)" substituted therefor. The definition of a member in Rule 3 was supplanted by the definition of a "Radio Officer" as "a qualified and experienced Radio Officer who is eligible for employment on vessels under contract to the Union." The reference to "Branch offices" of the Union are now references to "Branch Hiring Halls." Rule 4 (c) of the earlier rules, providing that the assignment lists should be confidential to members, was deleted. Also deleted were the provisions in Rule 7 that assignments were to be offered by the port assignment committees, the rule

now reading merely that "employment shall be offered" in the manner there provided.[3]

5. The Complaint's Allegations Concerning the Agreements and the Shipping Rules.

The complaint alleges that both the 1948 and 1950 agreements contain preferential employment provisions which are unlawful because of a failure to satisfy the requirements in the proviso to Section 8 (a) (3) of the Act, both as to the conduct of a union-shop election and the permissible limits of union security provisions. It is undisputed that the Union has not been authorized by the Board to enter into a union security agreement.

With respect to the Company, the complaint, as amended, also alleges inter alia that it violated Section 8 (a) (1), (2) and (3) by entering into the 1948 and 1950 agreements, by "knowingly assenting to and participating in the administration of" the 1948 agreement "as amended" which required the practice of obtaining all of its radio officers exclusively" from the Union, and by "knowingly assenting to and accepting the assignment lists established by

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[3]Rule 10 (e) of the 1950 rules provides that, "Radio Officers who are not members of the Union shall help defray the expense for upkeep of the Branch Hiring Halls by the payment of $25.00 for each three months each Radio Officer's name is registered for employment on board a union contract vessel. Such fee shall be paid for each three months in advance." The Union's constitution in effect during 1949 provided that membership dues were to be $15.00 quarterly, payable in advance, but the record does not disclose whether the amount has been changed.

the Union pursuant to alleged discriminatory shipping rules.

With respect to the Union, the complaint is silent concerning the adoption of new shipping rules during 1950, it being alleged instead that the former shipping rules here remained effective. The complaint also alleges inter alia that by entering into the 1948 and 1950 agreements, by adopting and administering discriminatory shipping rules, and by maintaining and administering assignment lists pursuant to such rules, the Union violated Section 8 (b) (1) (A) and (2) of the Act.

6. Conclusions Concerning the Agreements and the Shipping Rules.

The questions to be decided at this point relate to the agreements and the shipping rules and the practices of the Respondents thereunder without regard to the alleged discrimination against Underwood, which is considered separately below after a chronological statement of the facts surrounding Underwood's relations with the Respondents.

The initial question involves the 1948 agreement between PASA and the Union, the execution and performance of which are alleged to have been violative of Section 8 (a) (1), (2) and (3) by the Company and Section 8 (b) (1) (A) and (2) by the Union. As related above, this is not the first time the Board has had occasion to consider the 1948 agreement. In the Pacific Maritime case above cited, where the Union was not a party respondent the Board found that PASA had violated Section 8

(a) (1) by the execution of the agreement because of the unlawful preference provision therein. The complaint in that case also alleged a violation of Section 8 (a) (3) in the enforcement of the agreement, but the Board held that there was a "complete lack of evidence as to enforcement of the illegal provisions," and dismissed the 8 (a) (3) allegation. There was no 8 (a) (2) allegation, the absence of which was specifically commented upon by the Board in framing its remedy. As detailed above, after the issuance of the Board's decision, PMA and the Union negotiated new contractual provisions which they contend, contrary to the General Counsel, are lawful. The Union also adopted new shipping rules to replace those which are alleged in the complaint herein to have been discriminatory. Under these circumstances, I do not believe that issues should be litigated anew, that an alleged violation of Section 8 (a) (2) based upon the 1948 agreement should be entertained, or that the conduct of the Respondents pursuant to that contract and applicable shipping rules should be the subject matter of litigation at this late date, except to the extent that there is alleged an instance of specific discrimination. It would not effectuate the purposes of the Act to do so. Cf. Califruit Canning Company, 78 NLRB 112. To the extent that there was alleged unlawful discrimination against Underwood pursuant to the 1948 agreement and applicable shipping rules, the issues are properly subject to litigation in this proceeding. Cf. Agar Packing & Provision Corporation, 81 NLRD 1262.

Turning to the 1950 agreement, the basic allegation of the complaint is that the document is per se unlawful because of preferential employment provisions to members of the Union by reason of the Company's utilization of the Union's employment office as its sole source of Radio Officers, as set forth in Section 2 of that agreement, and because there has been no union-shop election to authorize the first paragraph of Section 3 thereof. On the other hand, the Respondents argue that the Company's use of the Union's employment facilities in securing radio officers, where there is no preferential employment provision based upon membership in the Union, and where instead the agreement expressly provides that the Union shall operate its employment facilities "in accordance with the law"[4] and that "no applicant or prospective employee shall be discriminated against because of membership or non-membership in the" Union, is a lawful

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[4]The union asserts that the contractual phrases, "qualified, competent and satisfactory," in reference to radio officers, and "in accordance with the law," include observance by the Union of certain prerequisites for dispatching radio officers: (1) A second class, or better, license by the Federal Communications Commission; (2) "a license by the U. S. Coast Guard as a condition to the right to be designated as a radio officer by Congressional Act (Public Law 525, 80th Congress, Second Session)"; and (3) screening by the Coast Guard of "all seamen (including, of course, radio officers) as to their loyalty and security risk status (Executive Order 10173, October 18, 1950; Fed. Reg. 7005, interprets or applies 40 Stat. 220, as amended, 50 U.S.C. 191)."

arrangement sanctioned by the Board in National Union of Marine Cooks and Stewards, 90 NLRB No. 167. The similarity between the proposed contractual provision in that case and the language of Section 2 of the 1950 agreement need not be set forth. In short, I find that the cited case is apposite and that Section 2 is not per se unlawful. Likewise, I find that the shipping rules of the Union, adopted during June, 1950, are not per se discriminatory against non-members of the Union. With respect to Section 3 of the 1950 agreement, the General Counsel's contention appears to be that the union security provision in the initial paragraph is in violation of the Act regardless of its postponed effective date as set out in the second paragraph.[5] This contention must be rejected. Gulf Shipside Storage Corporation, 91 NLRB No. 25.

Turning next to the question whether the 1950 agreement and the Union's applicable shipping rules have been administered in a discriminatory manner between members and non-members of the Union, the allegations insofar as they involve Underwood are deferred to a subsequent portion of this Report. There is no substantial evidence of a

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[5]The record discloses that all radio officers assigned by the Union to fill vacancies on vessels of the Company after execution of the 1950 agreement were members of the Union when assigned, but it does not disclose whether they have retained such membership, nor does it disclose whether other radio officers already occupying permanent positions aboard vessels of the Company have retained their membership.

discriminatory administration involving other radio officers, although there is testimony by Carl Lundquist, port agent for the Union in Seattle at the time of the hearing, that only members have been listed on its national assignment lists since adoption of the existing shipping rules. But this fact does not establish that those rules, not per se discriminatory, have been misapplied to a discriminatory end. The rules were approved by the Seattle branch of the Union on June 21, 1950, at which time there were more radio officers than there were available jobs, with the result that applicants had waited long periods of time for employment. On or about June 25, hostilities began in Korea, after which the demand for radio officers increased consistently until the available jobs outnumbered the applicants. Lundquist testified that with the increase in job opportunities, non-members sought employment through the Union. Insofar as the record discloses, non-members who did so were dispatched to jobs reasonably soon after applying, and some of them first sought membership in the Union and became "permit card members."[6] The name of none of the

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[6]During the period of June 29, 1950, to February 17, 1951, the Union made approximately 50 assignments of radio officers classified by it as non-members, some of whom were dispatched to more than one job, and eight of whom were dispatched through the Seattle branch of the Union. The name of none of the approximately 50 persons appears on a national assignment list as of the time he was dispatched. One of the eight dispatched from Seattle was listed on other records of the Union as

non-members appears on any national assignment list, but the explanation offered by Lundquist is a reasonable one, uncontroverted by the record. That is, the lists are prepared weekly in the national headquarters of the Union for distribution to the several branch offices. The basic purpose of the lists is to maintain records of radio officers who are seeking employment, designated on them as "Active," and unemployed radio officers who for personal reasons are not seeking employment, listed as "Inactive." In order to show the relative places of these individuals, week by week, it is necessary that the lists also contain the names of some employed radio officers, listed as "Employed," whose numbers increase at the rate of 30 places a week to make way for the names of "Active" and "Inactive" radio officers who steadily move upward on the lists during periods of unemployment. A sizable majority of the union members are not named on a recent assignment list, that of March 10, 1951—

being in "bad standing"; another was listed as a "permit card member," that is, as seeking membership; and two were listed as being on a "deferred list," that is, former members seeking reinstatement. The record does not disclose the union status, if any, of the four remaining radio officers who were carried on the Union's record as non-members and who received assignments from the Seattle branch. Of this entire group of radio officers, only Dallas Hughes, listed as being in "bad standing," was a witness. He testified for the General Counsel that he registered for employment about August 3, 1950, and was dispatched about that date, and that thereafter he was dispatched on four other occasions.

the Union has about 1,500 members—for the reason that they had been employed for periods of time long enough to give them numbers so low in shipping seniority as to place them at points on the list beneath the name of the radio officer listed as "Active" or "Inactive" at the bottom thereof. Since the basic purpose of the lists is to show the relative standing of "Active" and "Inactive" men, rather than "Employed" men, the names of employed men with higher numbers than as indicated are not listed.[7] Lundquist's uncontroverted explanation for the absence of names of non-members on the lists prepared under the current shipping rules is two-fold: (1) under the rules, a prerequisite to obtaining a place on a national assignment list is to register for employment, and some non-member radio officers did not do so;[8] and (2) although registering, a radio officer would not be

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[7]Shipping Rule 8 (b) 6 provides that, "The names of Radio Officers in the Employed column who shall * * * [by reason of dropping 30 places on the assignment lists for each week of employment] be in higher numbered positions than any held by Radio Officers registered as Active or Inactive, shall be removed from the list * * *"

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[8]Rule 5 (a) provides that, "All Radio Officers desiring to obtain employment shall register for the Assignment List and shall be designated as Active for a specific Branch Hiring Hall of the Union [according to the applicant's preference of the port from which he wishes to be dispatched]." Rule 6 provides for "Assignment List Application Forms" and that applications be transmitted to the Union's national office for placement on the assignment lists.

given a place on such a list if, before the next weekly compilation, he had been referred to a job,[9] in which category a number of non-member radio officers fell. After the termination of any employment, whether the radio officer be a member or non-member of the Union, he can achieve a place as "Active" on a national assignment list only by again registering therefor and not obtaining employment anew before the compilation of the next list. It does not appear that any non-member was treated any differently in this respect than a member.

Upon the evidence, there being no showing that under the existing shipping rules a place on a national assignment list has been denied to a non-member under circumstances where it would not have been denied to a member, I find that there has been a failure of proof that the Union's shipping rules have been misapplied so as to result in

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[9]Rule 8 (b) 7 is as follows:

The names of Radio Officers who have registered as Active or Inactive during the week, and who were not previously registered on the List during such week, shall be added to the Active or Inactive columns at the end of the List in numerical order, according to the date and hour each Radio Officer registered. This provision shall not limit the right of or prevent any Radio Officer who has registered as Active during the week prior to a compilation of the List and has not as yet been physically added to the List from being offered and accepting assignment. If such Radio Officer shall have accepted an assignment before his name shall have been physically added to the List, his name shall not be added during the next compilation of the List.

discrimination against radio officers because of non-membership. Accordingly, the proof does not establish that the 1950 agreement has been unlawfully administered, and I shall recommend that the complaint be dismissed in all respects other than the allegations concerning Underwood, which will now be discussed.

C.

The Discrimination Against Underwood

1. Chronology of Events

Prefatorily to considering the legal aspects of the alleged discrimination against Underwood, it is necessary to relate at some length the factual situation in his relations with the Respondents. On March 1, 1949, during the early life of the 1948 agreement, Underwood applied for membership in the Union. The application was acted upon favorably. While the record is silent on the period of his earlier membership in the Union or its predecessor, American Communications Association, he had formerly worked for the Company and it may be inferred that this was not his initial application.[10]

Beginning with April 1, 1950, soon after his latest membership in the Union, Underwood wrote a series of letters to it in which he said inter alia that he was interested only in employment by the

[10]As long ago as 1946, Underwood had made it known to representatives of the Union's predecessor that he was interested only in employment on vessels operated by the Company.

Company, that he opposed rotary hiring, and that he objected to "competing" under the rotary system with other radio officers for such employment. As clarified by his testimony, Underwood's position was that he preferred to work aboard vessels sailing in the Alaska trade, that employment by the Company offered the best opportunity therefor, that he wanted to be regarded as one "of the [Company's] licensed officers * * * as the master and the mates," who apparently were not employed under a rotary system, and that it was unfair for radio officers who were willing to work for any employer to compete with him under rotary hiring for employment with the Company, which offered a "very small proportion of the total jobs," when he did not compete with them for the greater number of jobs available with all other employers.

On March 31, 1949, while a member of the Union, Underwood accepted referral to the Coastal Rambler, one of the Company's vessels. He remained so employed until early August when, contrary to his expectations, the vessel was temporarily removed from service and the crew was paid off. Underwoods assignment to the Coastal Rambler had been a "permanent" one. He therefore had the right under the Union's shipping rules to exercise a choice between the following alternatives: (1) retaining his position aboard the Coastal Rambler by "standing by" the vessel, without compensation therefor, and seeking employment which did not require use of his radio operator's license, or (2) seeking employ-

ment requiring use of his license by taking a place on the assignment list at an appropriate number determined by the period of his employment on the Coastal Rambler. The latter alternative involved relinquishing his position on that vessel, in which event, when the vessel next sailed, the position would be offered to the radio officer at the top of the assignment list. At first Underwood chose to stand by. He sought to obtain unemployment compensation during the period of standby, but found that under the rules of the State Unemployment Compensation Commission he was not entitled to such compensation unless he was actively seeking employment at a position requiring use of his license. Faced with the choice of standing by the Coastal Rambler without compensation from the Company, or relinquishing the standby right and drawing unemployment compensation, Underwood chose the later. On August 10, he registered for a place on the assignment list as actively seeking employment, but his number was quite low because he had dropped 30 places a week for the period of about 18 weeks aboard the Coastal Rambler. When that vessel returned to service in late September, the position of radio officer was offered to another member of the Union with a greater period of unemployment than Underwood, consistent with the Union's effort to equally divide the employment opportunities among its members.

During early September, a temporary position became available aboard the Palisana, another of

the Company's vessels, as relief operator for Tom Josserand who held the position in a permanent capacity and who had chosen to leave the vessel for an uncertain period, maintaining his right to stand by and to return to the position later. Since Josserand had the right to return and replace the operator who relieved him, the result for that operator would be temporary employment with the consequent drop of 30 places a week on the assignment lists for each week of employment. The relief job was offered to a number of unemployed operators, who declined it. Finally, in this way, Underwood's name was reached. On September 14, he accepted the assignment, hopeful that Josserand would not return to the vessel and that somehow he could keep the position in a permanent capacity. Under the Union's shipping rules in existence sometime earlier, an operator who held a temporary assignment could retain the position in a permanent capacity if the operator being relieved chose not to return to the vessel. These rules had been changed in early 1949, however, and Underwood knew when he accepted the assignment aboard the Palisana that, under rules then existing, if Josserand chose not to return to the position, thereby opening it for a permanent assignment, the radio officer at the head of the asisgnment list would have the initial choice.

About November 23, the Palisana was put in idle status for approximately a month, and the crew was paid off. On December 1, Underwood registered

for a place on the national assignment list as actively seeking employment.[11]

Underwood's experiences in the Coastal Rambler and Palisana positions made him aggrieved. He was so far down the assignment list that, as he testified, he believed that not until 1951 could he be reached for employment by the employer of his choice, the Company. Underwood was wrong in this estimate, as will be developed, but the point is that his opposition to rotary hiring and to the Union's shipping rules gained momentum. He felt that he was entitled to seniority rights with the Company and that the rotary hiring system resulted in discrimination against him. On December 23, Underwood wrote to the Company and requested "retention" of the position aboard the Palisana. In the letter, Underwood termed the position his own, which he "was forced to relinquish a short time ago on account of the temporary lay-up of this vessel and certain illegal bylaws of the" Union. Underwood, who had received preference in employment by reason of his membership in the Union,

[11]Underwood testified that sometime subsequent to December 1, 1949, Ralph Miller, then the Union's port agent in Seattle, offered him a temporary position aboard the Baranof, a vessel of the Company's, which he declined because of its temporary nature. The incident involving the Baranof occurred before January 17, 1950, because it is set out in the charge in Case No. 19-CB-90, filed on that date. An examination of exhibits showing the voyages of the Baranof and the radio officers assigned by the Union to positions aboard, establish that the incident occurred while Underwood was a member of the Union.

did not have reference to the provisions of the Act in his allegation that the Union had "certain illegal bylaws." Instead, his reference was to the rotary hiring aspects of the bylaws which, as he saw it, were in disregard of his claimed seniority rights with the Company and which had not enabled him to obtain employment permanently with the employer of his choice. As the Company says in its brief, Underwood prefers "a system based upon job availability and seniority with one company * * * [His] position and views would be the same and would have been the same under a rotary hiring system operated by employers on an industry-wide basis without the union in the picture at all."

By December 27, Josserand had decided not to return to the Palisana. On that day, the vessel was removed from idle status preparatory to sailing and, under rotary hiring, Cyrus Wagoner was offered the position in a permanent capacity. Wagoner accepted.[12] On December 28, Underwood wrote a letter of resignation to the Union, saying inter alia that he had resolved for the New Year (1) to seek to avoid approaching poverty which had been caused by his "poor luck" in obtaining employment under the Union's "employment roulette wheel [the system of rotary hiring] * * *," and (2) "To fight a system * * * [which] will tolerate a set of bylaws

[12]Although the Palisana was in idle status at various times thereafter, Wagoner apparently chose to stand by during those occasions, rather than to seek other employment requiring use of his license, because at the time of the hearing he still held the position.

that foster the complete elimination of the freedom of the individual and the utter disregard of earned and proven seniority rights."

As related, Underwood was interested in employment with the Company only. He testified that he would accept other employment only "under duress," the force of economic necessity. Accordingly, after resigning from the Union Underwood did not make application for employment to any other employer represented by PASA. On or about December 29, Underwood called upon William Felton, port engineer for the Company, and requested employment. He filled out an application blank and left it with Felton.

At a union meeting during January, 1950, Underwood's resignation was accepted, and during that month his name was removed from the national assignment lists[13] because he resigned from the Union.[14]

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[13]The assignment list prepared on December 31, 1949, on a nationwide basis contained Underwood's name as number 828. Of the radio officers desiring to ship out of Seattle, Underwood was number 21. The copy of the list which was sent to the Union's Seattle office shows Underwood's name marked through with ink, after which appear the words: "Out of Union." It does not appear, however, when the deletion was made, and Underwood's name appears on the national list for the following week, ending January 7, 1950, opposite number 796, Underwood having advanced 32 places toward the top of the list during the period of a week. Underwood appears not to have been named on any national list thereafter.

[14]The Union contends that Underwood's name was removed from the lists because it was understood

On January 17, 1950, Underwood filed charges against both Respondents in Cases Nos. 19-CB-90 and 19-CA-277. Copies of the charges were served upon the respective Respondents on January 19 and 21, 1950. Beginning on March 3, and continuing for about three months, Underwood wrote a series of letters to the Company in which he expressed (1) a continuing interest in obtaining employment with the Company, (2) his opposition to rotary hiring of radio officers, and (3) his preference for hiring based upon seniority with the Company which, in his judgment, would have afforded him a better opportunity for obtaining employment with it. So far as the record discloses, the Company has never made it a practice to employ radio officers under

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that he so desired, preferring to seek employment through other channels. This contention is unpersuasive. At that time, before the opening of hostilities in Korea, the number of radio officers seeking employment through the Union far surpassed the number of job openings on any given date. The 1948 agreement then in effect provided that preference in employment be given to members of the Union, and the applicable shipping rules provided that the assignment lists should be restricted to members and were designed to give them preference in employment. Moreover, the failure of the Union to reinstate Underwood's name to the assignment lists during the early months of 1950, when he was seeking employment with the Company and when the Company requested of the Union that he not be discriminated against, as described below, is indicative that his name was removed, and remained removed, from the assignment lists during those months because he had resigned from the Union.

the system advocated by Underwood. See Pacific American Shipowners Association, 80 NLRB 622.

On March 20, Underwood filed an amended charge in Case No. 19-CA-27, copy of which was served upon the Company on March 21. On March 29, the Company wrote to the Union and to Underwood, enclosing to each a copy of its letter to the other. In the letter to the Union, the Company said that Underwood had made application for employment on December 29, 1949, and that another radio officer, Dallas Hughes, had made application on December 12. The letter contains the following paragraph:

> We request that when radio officers are ordered [by the Company] from your office that these applicants, upon registering with you, be dispatched without discrimination as to union or non-union affiliation or other discrimination whatsoever, anything in our collective bargaining agreement to the contrary notwithstanding. It is also requested that their registration with you be deemed effective from the date of the application filed with us. We, of course, reserve the right to reject for sufficient cause any person dispatched to us.

The letter to Underwood was as follows:

> * * * We are unable to give consideration to applicants for employment made to us by mail. We make use of the employment facilities of the office maintained by the American Radio Association * * *
>
> You are requested to register with that office

> and we have requested that you be dispatched to us without discrimination * * * If after so registering you consider that any discrimination has been practiced against you, kindly advise us in writing.

On April 3, 1950, following the Company's suggestion, Underwood called at the Union's office. He testified that he registered for employment, but the circumstances are not clear. He did not fill out an assignment slip, which is the normal and customary manner in which a radio officer seeking employment obtains a place on the national assignment lists. I believe, however, that it is immaterial that he did not do so. His name had been discriminatorily stricken from the assignment lists of December 31, 1949, and January 7, 1950. Had it not been stricken therefrom, it would have continued to rise toward the top of later lists, in accord with the principles of rotary hiring as persons ahead of him obtained employment, until he was offered employment which he would have accepted aboard the Alaska on May 5, 1950, as described below.

Also on April 3, Underwood wrote to the Company again. On April 12, the Company wrote to the Union, enclosing Underwood's letter and saying that Underwood had expressed the opinion that the Union would discriminate against him. The Company voiced the hope that the Union would not do so. On April 16, according to the undenied testimony of Underwood, which I credit, he chanced to meet Ralph Miller, then port agent of the Union

in Seattle, and Miller offered him an assignment to another of the Company's vessels, the Flemish Knot, if he would withdraw the charge against the Union. Miller said also, as Underwood testified, that he would hold a union meeting to determine whether the membership would reinstate Underwood. The assignment on the Flemish Knot was declined by Underwood because he believed that it might be of short duration, and he asked Miller for a guarantee of six months' work as a condition for withdrawing the charge.[15] Miller replied that he would take up the matter with the membership, and Underwood heard no more about it.

On April 19, Miller responded to the Company's letter, saying that Underwood and Hughes had been listed for employment and that there would be no discrimination against them. Underwood's name does not appear to have been restored to a national assignment list, however.

On April 28, the Board issued its decision in the Pacific Maritime case.

On May 3, 1950, the Company's vessel, Alaska, which had been laid up since October 1, 1949, re-

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[15]The position on the Flemish Knot was filled by the assignment on April 21 of Gena C. Hallett, a radio officer who had a higher position than Underwood on the national assignment lists from which Underwood's name was stricken. The position on the Flemish Knot appears to have been a permanent and relatively long one, contrary to Underwood's expectations. With the exception of two periods of idleness, totaling about two weeks, the vessel was in continuous service from April 19, 1950, to at least late February, 1951, when the hearing began.

turned to service. Albert Dittberner and George D. Johnston, chief radio operator and first assistant, respectively, had retained their permanent positions on the vessel by remaining in standby. The second assistant radio operator during late 1949 had been Jesse D. Sneff, who apparently had not chosen to stand by the vessel. On May 5, Lewis A. Deyo was dispatched by the Union to fill Sneff's former position. For reasons detailed below, I find that the failure to offer this assignment to Underwood was discriminatory within the meaning of the Act. On May 7, 1950, Underwood wrote to the Company that it could "plainly see" that he would "get nothing but discrimination from" the Union, and he asked for employment in return for which he would withdraw the charges against the Company. The record does not disclose whether Underwood had knowledge of or reference to the assignment of Deyo. Nor does it appear that the Company responded to Underwood's letter.

During June, 1950, the membership of the Union at its various port offices adopted the new shipping rules. On July 14, the Union and PMA executed the 1950 agreement. Because of the allegations of the complaint that Underwood was unlawfully discriminated against in the administration of that agreement, it is necessary to continue the factual recital concerning Underwood's relations with the Respondents, although unlawful discrimination against Underwood was practiced on May 5 in the failure to offer him the assignment aboard the Alaska.

On July 23, 1950, Underwood, having been unable to secure employment with the Company, went to Kake, Alaska, for employment as a radio operator in a cannery. On September 11, while there, his counsel filed in his behalf charges in Cases Nos. 19-CB-135 and 19-CA-358.

On October 9, 1950, having returned from Kake, Underwood telephoned Lundquist, who had succeeded Miller as port agent. Underwood said that he was available for employment within the following limitations: by the Company only, in a permanent capacity, aboard a vessel sailing in the Alaska trade, the voyages of which were to be of short duration. Lundquist had established a practice of preparing port assignment lists based upon the names of radio officers on the national lists who desired to work out of Seattle, and he noted on the port list in use that week that Underwood had made known his availability for employment within limits. On October 13, Underwood declined referral by the Union to a position on a vessel in the Military Sea Transport Service because he preferred employment with the Company.

On December 5, Underwood again telephoned Lundquist, saying that he would accept a temporary or permanent position on vessels of the Company in the Alaska trade.[16] Underwood also said that he

[16]Lundquist testified that this telephone conversation occurred on December 5, while Underwood fixed the date as December 12. The Seattle port assignment list indicates that the conversation took place during the week of December 4, rather than the following week, and I find that the correct date was December 5, as testified by Lundquist.

had been registered for employment since December 1, 1949, the date of registration following his employment aboard the Palisana, and he asserted that his name therefore should be at the top of the current national assignment list. The basis of Underwood's contention seems to have been that his name should have continued to move upward on the lists each week after that date, including the period of his employment in Kake. Lundquist said to Underwood, erroneously, that Underwood's name was at the bottom of the national assignment list, "where it belonged." He also said, correctly, that Underwood's name was "not at the bottom" of another list, presumably the port assignment lists upon which Lundquist had placed Underwood's name. Lundquist said further that he could not discriminate against Underwood, nor could he discriminate against members of the Union.[17]

Between October 9 and December 5, the dates of the two telephone conversations, Underwood did not visit the Union's hiring hall. In that period, there were only two vacancies within the limitations imposed by him, one of which, aboard the Victoria,

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[17]The finding that Lundquist said that Underwood's name was at the bottom of the national assignment list "where it belonged" is based upon Underwood's testimony. Lundquist testified that he could not recall what he had said in the telephone conversation, but that later he realized that he may have used "poor language" which could have caused Underwood to obtain a "misconception," and that he, Lundquist, sought to correct any misconception when they met on December 13, as described below.

was filled in a "pierhead jump," an emergency situation caused by the failure of the operator regularly assigned to the vessel to appear for the voyage and the assignment of an unemployed operator regardless of his place on the national assignment list.[18] There was inadequate time in which to reach Underwood, whose residence is on Vashon Island, between Seattle and Tacoma. The second vacancy, on the Denali, was filled by an operator who was higher than Underwood on the national assignment list of January 7, the last list upon which Underwood's name appeared.

On December 13, Underwood, accompanied by Hughes, called at the Union's hiring hall and talked with Lundquist. There was some discussion about dispatching radio officers to employment, and Underwood spoke of his inability to retain the permanent position aboard the Coastal Rambler during 1949 because of the rules of the State Unemployment Compensation Commission which he characterized as discrimination against him. Underwood reiterated his statement of December 5 that he would accept temporary employment on vessels of the Company in the Alaska trade, and again insisted that his name should appear at the top of the current national assignment list because he had not received referral to employment since December 1, 1949, about a year earlier. Lundquist said that Underwood's name was being carried on the port

[18]Rule 20 (2) of the Union's shipping rules envisions assignments out of rotation in situations of this nature.

assignment lists, as it had been since Underwood's telephone call to Lundquist on October 9. Lundquist also said that Underwood's name did not appear on the national assignment lists because he was not a union member.[19]

On December 19, by telegram, Lundquist advised Underwood of a position aboard a vessel of the United States Government sailing in Alaskan waters. Underwood declined it because the voyage was scheduled for four months, too long a period to suit his wishes, and also because he preferred to await employment with the Company. Between that date and February 6, 1951, shortly before the hearing herein, six vacancies occurred aboard vessels of the Company within Underwood's limitations. The Union did not utilize telephone or telegraph service in an effort to inform Underwood of any of the vacancies nor does it appear that he visited the

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[19]This finding is based upon the testimony of Underwood and Hughes, which is flatly contradicted by Lundquist. While I am mindful that Hughes' testimony on the point was obtained only after a leading question, and that the testimony of Underwood and Lundquist must be scrutinized because of their interests, I think that the testimony of Underwood and Hughes is to be accepted. Clearly, as already found, Underwood's name did not appear on national assignment lists after January 7, 1950, and at least until the new shipping rules were adopted, because he was not a member of the Union. This finding, however, does not resolve the question whether the Union would have refused Underwood a place on the national assignment lists under its existing shipping rules had Underwood sought to register therefor. The issue is discussed below.

Union's hiring hall to seek an assignment. There is uncontradicted testimony by Lundquist, however, that in one instance the vacancy was filled by a radio officer who was entitled to the assignment in preference to Underwood under a non-discriminatory application of the shipping rules, while in the remaining five instances the positions had to be filled quickly and there was too little time in which to attempt to contact Underwood on Vashon Island and have him arrive at any of the vessels before sailing time.

On February 27, during the course of the hearing, the Union offered to refer Underwood to a permanent position aboard a vessel sailing in the Alaska trade, the Pacificus, operated by Coastwise Line, a member company of PMA. Underwood accepted, and he was employed in that position when the hearing closed about a month later.

2. Conclusions Concerning Underwood

The amended complaint alleges that the Union, by utilizing discriminatory shipping rules and assignment lists, refused to dispatch Underwood for employment with the Company, thereby causing the Company to discriminate against Underwood in violation of Section 8 (a) (3) of the Act, and thereby iteslf violating Section 8 (b) (2).[20] The allegations

[20]The complaint also alleges that the Union refused to dispatch Underwood to positions with employers other than the Company. Since Underwood was not an applicant for other employment until he accepted the position aboard the Pacificus, having previously rejected assignments with other employers and having testified that he would accept such assignments only "under duress," this allegation has no merit.

that the Company discriminated against Underwood are in substance twofold: (1) by obtaining all of its radio officers through the Union and by accepting and assenting to assignment lists from which the Union unlawfully excluded Underwood, and (2) by refusing to employ Underwood after he made application directly to the Company during December, 1949.

First to be considered are the allegations against the Union and the initial allegation against the Company during the period following Underwood's resignation from the Union and before execution of the 1950 agreement. It will be recalled that Underwood, while a member of the Union, had a "permanent" position aboard the Coastal Rambler and that in order to draw unemployment compensation he chose not to remain in standby status when the vessel was temporarily removed from service. Underwood regarded the situation as one of discrimination against him, but it is clear that there was no discrimination as contemplated by the Act. As a consequence of employment aboard the Coastal Rambler, and later employment aboard the Palisana, Underwood dropped so far down the assignment lists that he believed there was no prospect for employment with the Company in a position to his liking until 1951. In this respect Underwood was mistaken, but he felt prejudiced by the Union's shipping rules, uniformly applied to him and other members. Accordingly, he resigned his membership and sought to achieve directly from the Company the employment which he desired.

As mentioned above, on May 5, 1950, Underwood was unlawfully denied employment. The circumstances will be related. Underwood's name had been removed from the national assignment lists because of his resignation from the Union. His name last appeared on the list of January 7, 1950, with the number 796. From the time of his resignation until May 5, there were six vacancies on vessels of the Company suitable to his preferences.[21] All these vacancies were filled by referral of radio officers with lower numbers than Underwood (higher numbers in the order of shipping seniority) on the list of January 7, which is consistent with Underwood's own analysis of his poor prospects for employment with the Company at the time of his resignation. On May 5, which was subsequent to the Company's written request of the Union that Underwood be referred for employment without discrimination, a vacancy in a permanent position aboard the Alaska was filled by the Union's referral of Lewis A. Deyo, and at this point, had Underwood's name not been stricken from the assignment lists he would have been entitled to referral to the position ahead of Deyo under the principles of rotary hiring. The contention of the Union and the Company is that Deyo was entitled to the assignment, even assuming that Underwood's name had remained on the assign-

[21]February 23 on the Square Sinnet, February 24 on the Denali, March 14 on the Nadina, April 5 on the Coastal Rambler for its initial voyage in 1950, April 8 on the Lucidor, and April 21 on the Flemish Knot.

ment lists.[22] Documentary evidence was offered by the Union to establish this contention, but when it is examined in the light of the entire record a fallacy is apparent. As contrasted with Underwood's place on the January 7 list, #796, the Union incorrectly asserts that Deyo's number was 793, from which point he had advanced to number 544 at the time he was offered referral to the Alaska. The fact, however, is that Deyo's number on the January 7 list was 815 or thereabouts, as set out in the footnote.[23]

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[22]In its brief, the Company argues that "This exchange of correspondence [with the Union] clearly establishes an agreement between the union and the company as to Mr. Underwood which removed any alleged application of the illegal portion of the hiring provisions of the December 3, 1948, agreement to Underwood. The fact that Underwood's registration was accepted on April 3 [when Underwood visited the Union's offices] and presumably made effective * * * on December 29, 1949, [prior to the effective date of Underwood's resignation from the Union] in accordance with the Company's request * * * also pointedly demonstrates that the normal channels of employment were at all times open to Underwood irrespective of his union status * * * [At] all times subsequent to April 3, 1950, Mr. Underwood received equal treatment in the normal channel of employment." The fact that the Union did not restore Underwood's name to the national assignment lists, plus the facts surrounding the referral of Deyo, rather than Underwood, to the position aboard the Alaska, disprove the Company's contention.

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[23]The assignment list for January 7 was not offered in evidence. The list of radio officers dispatched by the Union to positions with the Company shows Deyo's referral to the Alaska, and after

Under the facts herein, the preference in employment to members of the Union resulted in an unlawful denial of employment to Underwood.[24] The record leaves no doubt that Underwood would have

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Deyo's name there is the number 793 to signify his place on the January 7 list. That number had been marked through under circumstances which were not detailed, and the number 815 substituted. The Union's testimony concerning Deyo's referral assumed that number 793 was correct, thus giving Deyo preference over Underwood for the referral. The number 815, or a number thereabouts, is correct, however. This is so because on the assignment list dated December 31, 1949, only a week earlier, which was received in evidence, Underwood was number 828 and Deyo was number 845. Since Underwood was unemployed, Deyo could not have advanced over and beyond Underwood on the list of January 7. The conclusion that Deyo's number on the latter list was 815 or thereabouts is further supported by the fact that the number for Harry O. Buer thereon is 812, and only a few places separated these two individuals on the list dated December 31, Buer having been #843 thereon.

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[24]In its brief, the Company asserts that the record is barren of evidence that Underwood informed it that he had resigned from the Union, that it knew of the resignation at times material, and that Underwood advised it that union affiliation or non-affiliation played any part in his opposition to rotary hiring. Instead, says the Company, its information was that Underwood opposed rotary hiring on an industry wide basis, as described herein, and "that he believed that the company should establish a system based upon seniority with the company which would afford him a better chance of securing employment" with the Company. In fact, however, the amended charge in Case No. 19-CA-277, served upon the Company on March 21, 1950, alleges that the Company refused to employ Underwood "to

accepted the position aboard the Alaska. I find that the Company discriminated against Underwood in violation of Section 8 (a) (3) and (1) of the Act, and that, by causing the Company to do so, the Union violated Section 8 (b) (2) and (1) (A) thereof.[25]

Turning to the Company's refusal to hire Underwood after his application for employment during December, 1949, the General Counsel contends that there was a continuing duty upon the Company, be-

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encourage membership in" the Union in violation of Section 8(a)(3), and the Company's letter to the Union about a week later asked that the Union dispatch Underwood for employment "without discrimination as to union or non-union affiliation or other discrimination whatsoever, anything in our collective bargaining agreement to the contrary notwithstanding."

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[25]A finding that the Company, by thus discriminating against Underwood, also violated Section 8 (a) (2) would be in accord with the authorities. Cf United Hoisting Co., Inc., 92 NLRB No. 243. I believe, however, that the finding should not be made. There are two reasons. First, the allegation of the complaint, as amended, that Section 8 (a) (2) was violated by discrimination against Underwood is included within a series of allegations dealing with the 1948 and 1950 agreements and alleged practices of the Respondents thereunder. That an 8 (a) (2) violation was in issue arising specifically out of the treatment accorded Underwood before execution of the 1950 agreement appears to have been lost sight of by counsel and the Examiner in discussions interpreting the amended complaint and motions directed thereto, and counsel may have concluded, as did the Examiner, that such a violation was not in issue. The point was not

ginning with the first vacancy aboard one of its vessels, to fill a vacancy by employing Underwood.[26] The theory appears to be that the 1948 agreement having contained an unlawful preference clause, there was an absolute duty upon the Company to disregard the principles of rotary hiring and to employ a radio officer who made direct application to it in preference to a radio officer referred by the Union. On the other hand, the Company asserts that it maintains no facilities for directly hiring

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briefed. Second, even if such a finding were to be made, it would not lead me to alter the remedy set out below. This is so because no violation of Section 8 (a) (2) having been alleged in the Pacific Maritime case, the parties thereto were left free to negotiate anew. Specifically, PMA was not directed to withdraw and withhold recognition from the Union. For nearly one year, PMA and the Union have had a lawful contractual arrangement, the 1950 agreement, and I do not believe that at this date it would effectuate the policies of the Act to require that the Company withdraw and withhold recognition because of the discrimination against Underwood prior to execution of that agreement.

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[26]In addition to the vacancies described in footnote 21, there was the position aboard the Palisana which Underwood sought to achieve permanently for himself by his application to the Company, but which was assigned to another radio officer higher on the assignment list before Underwood resigned from the Union. In addition, there were a number of positions aboard other vessels of the Company which were held permanently by men in standby status, who returned to their respective positions when the vessels resumed operation. Those positions, in my judgment, were not vacant positions denied to Underwood.

radio officers, that since 1935 it has utilized the services of the Union and predecessor unions in order to employ such officers, as have other employers in the industry wide unit, and that the provisions of the 1948 agreement embodying rotary hiring were lawful except insofar as preference in employment was given to members of the Union.

I do not believe that the mere existence of the unlawful preference provision of the 1948 agreement obligated the Company to employ Underwood in the first vacancy arising after his application. The preference provision did not result in discrimination against Underwood until the employment of Deyo on May 5, 1950. It was under normal principles of rotary hiring, long an integral part of the Company's hiring practices, that he was denied employment with the Company until that date, and indeed it was precisely those principles to which he objected, and which furnished the basis for his resignation from the Union when he foresaw them as probably precluding such employment because many other radio officers possessed greater shipping seniority. No authority has been cited to support the apparent contention, and I do not perceive, that by resigning from the Union Underwood achieved a preferred status over all others, thereby overcoming his lack of shipping seniority and obligating the Company to hire him.

We turn next to the alleged discrimination against Underwood under the 1950 agreement and applicable shipping rules. As found above, that agreement is not per se unlawful, nor are those shipping rules

per se discriminatory as to non-members. Indeed, the complaint does not allege that those rules are discriminatory, the allegation being erroneously that the earlier rules had been continued in effect. The General Counsel does not contend that after the adoption of those rules and the execution of the 1950 agreement, Underwood sought a place on a national assignment list by the prescribed practice of executing an assignment form. Indeed, it was Underwood's contention that he was entitled to a place at the top of those lists in late 1950 because of his registration on December 1, 1949, after his employment aboard the Palisana terminated. While it is true that Underwood's name had been removed from the lists with the object and result of discriminating against him unlawfully, I do not believe that I can justifiably conclude that there has been an unlawful administration of the 1950 agreement or a misapplication of the existing shipping rules. The most that can be said for the General Counsel's contention is that doubt exists that the Union will abide by those rules where Underwood is concerned. This doubt arises from Lundquist's remark to Underwood that the latter's name did not appear on a national assignment list because he was not a member, and the failure of the Union voluntarily to restore his name to the lists after adoption of the new rules. On the other hand, upon Underwood's return to Seattle from employment in Kake, Alaska, he had his initial communication with the Union after those rules became effective—a telephone conversation with Lundquist in which he said that he

was available for employment within certain limitations. Thereafter, Lundquist placed Underwood's name on the port assignment lists and offered to refer him to employment, although he had not registered therefor under the provisions of the rules.[27] The Union asserts that, had he registered, and had he thereafter rejected employment opportunities before compilation of the next national assignment list, he would have been entitled to, and would have received, a place thereon. Underwood chose, however, to rely upon a registration antedating the new rules by about seven months. Under the circumstances, where it appears that other non-members who registered for employment were not treated differently than members, I do not believe that the Union has been put to the test of whether it will treat Underwood differently than a member in the application of the existing shipping rules, and I find that the 1950 agreement has not been adminis-

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[27]A new registration is required after each period of employment in a position requiring use of the radio operator's license, and under the rules it is immaterial whether the employment (1) was achieved through the Union's facilities or by the radio officer's personal efforts, (2) was ashore or afloat, and (3) was with an employer under contract with the Union. This rule was carried over from the earlier rules when only members of the Union were entitled to be placed on assignment lists, and appears to have had its basis in an effort to prevent a member's obtaining employment without notice to the Union and having his name mount on assignment lists as "Active" or "Inactive" when in reality "Employed."

tered so as to result in unlawful discrimination against him.

IV.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in Section III, C, above, occurring in connection with the operations of the Company described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V.

The Remedy

Having found that the Respondents have engaged in unfair labor practices, I shall recommend that they cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act. I have found that on May 5, 1950, in filling a vacancy aboard the Alaska, the Company discriminated against Underwood in violation of Section 8 (a) (1) and (3) of the Act, and that the Union caused the Company to discriminate against Underwood, thereby violating Section 8 (b) (2) and (1) (A). The position aboard the Alaska as second assistant radio officer was a "permanent" one, and the vessel was in service for the period of May 3 to October 14, 1950. On the latter date, the Alaska was removed from service and its crew was paid off. I shall recommend that the Company and

the Union, jointly and severally, make whole Underwood for any loss of pay he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned as wages from May 3 to October 14, 1950, inclusive, less his net earnings (Crossett Lumber Company, 8 NLRB 440, 497-8) during said period, the payment to be computed upon a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB No. 41. I shall also recommend, in accordance with the Woolworth decision, that the Company, upon request, make available to the Board and its agents all pertinent records. The Company's argument in its brief that Underwood should not be awarded back pay because his unwillingness to accept employment opportunities with other employers amounted to "a wilful incurrence of wage loss" is not persuasive. Within approximately two months after the Respondents' discrimination against Underwood, he accepted employment in Kake, Alaska, which continued for about the period that the Alaska was in service during 1950.

The next question is whether the Company shall be required to offer Underwood employment aboard the Alaska, or a substantially equivalent position. As related, the Alaska was removed from service on October 15, 1950. As of February 20, 1951, the vessel had not been returned to service. While the record is not specific on the point, it appears that the Alaska was laid up for the winter, rather than

permanently removed from service.[28] Under such circumstances, Underwood would have enjoyed the right to stand by the vessel during the period it was laid up, thereby retaining his position.[29] It is perhaps questionable that Underwood would have chosen to stand by.[30] Whatever doubt there may be

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[28]The Company's practice is to withdraw certain vessels from service at the end of its busy season each year. The Alaska is a passenger vessel which is not operated the year around. It was laid up from October 1, 1949, to May 2, 1950, when it returned to service for the period ending May 14, 1950.

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[29]While the Union for some time has had a rule limiting standbys, under certain circumstances, to maximum periods of 90 days, the rule is not enforced in the Seattle area in instances of vessels which are operated only in the spring and summer seasons. See the next footnote. Counsel for the Union indicated by his questions of a witness that the reason lies partly in the seasonal nature of the Company's business.

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[30]During the period of October 1, 1949, to May 2, 1950, when the Alaska was laid up, two of its radio officers, Dittberner and Johnston, chose to stand by. The third radio officer, Jesse D. Sneff, did not stand by for the entire period, and was succeeded on May 3, 1950, by Deyo. This period was one of slack employment for radio officers, and the record shows that those who held permanent positions aboard desirable vessels made it a practice to stand by when the vessels were laid up in order not to lose the positions. After the Alaska was laid up on October 15, 1950, when employment opportunities had greatly increased following the beginning of hostilities in Korea, Dittberner, Johnston and Deyo gave up their rights to stand by the vessel, as is shown by certain port assignment lists.

should not be resolved in favor of the Respondents, however, because their discrimination against Underwood gave rise to the doubt. I believe, therefore, that the Company should be required to offer Underwood immediate employment in the position of Chief Radio Operator aboard the Alaska, to which position he would have advanced under the Union's shipping rules,[31] or to a substantially equivalent position,[32] without prejudice to his seniority or other rights and privileges. I shall recommend accordingly. I shall also recommend that the

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[31]Shipping Rule 13, entitled "Promotions Aboard Ship" is as follows: When a vacancy occurs on a ship upon which more than one Radio Officer is employed, such vacancy shall be filled by promoting the remaining Radio Officer or Radio Officers provided that such Radio Officer is competent and qualified in the judgment [of the] Branch Hiring Hall and has faithfully complied with Hiring Hall rules and policies during the term of his employment on such job. For the purposes of this section, competence shall be deemed to be satisfactory if no provable complaint of unsatisfactory performance of work has been filed with the Union Hiring Halls. Qualification shall be deemed to be satisfactory if the Radio Officer shall possess a requisite grade of Radio Operator license for the job. There shall be no special qualifications instituted by any Branch Hiring Hall which shall conflict in any manner with the terms of this section.

Underwood testified without contradiction, and I find, that he possesses the requisite grade of radio operator's license for the position of Chief Radio Officer on vessels of the Company.

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[32]See The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch, 65 NLRB 827.

Union and the Company, in the manner above provided, make Underwood whole for any additional loss of pay he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from the date the Alaska was returned to service after October 15, 1950, to the date of the Company's offer of employment,[33] provided, however, that the Union may terminate its liability for further accrual of back pay to Underwood by notifying the Company, in writing, with a copy of such notification to Underwood, that the Union has no objection to his employment as recommended herein. The Union shall not be liable for back pay accruing after 5 days from the giving of such notice. Absent such notice, the Union shall remain jointly and severally liable with the Company for all back pay that may accrue to Under-

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[33]Since Underwood was employed aboard the Pacificus before the Alaska commenced operations in 1951, there can be no question of wilful loss of earnings for this period. The Pacificus is not operated by the Company, but by Coastwise Line, a member company of PMA. In its brief, the Company contends that it should not be required to employ Underwood because he has obtained substantially equivalent employment. I believe, however, that the policies of the Act will best be effectuated by the recommendation of Underwood's employment, regardless of whether Underwood has obtained equivalent employment elsewhere. Atlantic Company, 79 NLRB 820. Moreover, the record does not disclose sufficient facts about the position aboard the Pacificus to determine whether it is equivalent to that of Chief Radio Operator aboard the Alaska.

wood until the Company offers him employment as recommended. George W. Reed, 94 NLRB No. 109.

As found above, the 1950 agreement and applicable shipping rules are lawful and non-discriminatory as to non-members of the Union. Their continued observance by the Respondents as to all radio officers, including Underwood, would not be unlawful. Accordingly, nothing herein is intended to exempt Underwood from the requirements of lawful shipping rules and collective labor agreements at the conclusion of such employment as shall be offered to him by the Company as above provided.

In accordance with the Board's practice in factual situations of the nature presented herein, broad cease and desist orders will not be recommended. Carlyle Rubber Co., Inc., 92 NLRB No. 70.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Horace W. Underwood, thereby encouraging membership in a labor organization, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaran-

teed in Section 7 of the Act, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. By causing the Company to discriminate against Underwood in violation of Section 8 (a) (3) of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

5. By restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

7. In all respects other than the discrimination against Underwood, the Respondents have not engaged in the unfair labor practices alleged in the complaint as amended.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, I hereby recommend that:

1. Alaska Steamship Company, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Encouraging membership in American Ra-

dio Association, CIO, or in any other labor organization of its employees, by refusing to employ any qualified person or by discriminating in any manner in regard to the tenure of employment or any term or condition of employment of its employees, except to the extent authorized by Section 8 (a) (3) of the Act; and

(2) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.

(b) Take the following affirmative action which I find will effectuate the policies of the Act:

(1) Offer to Horace W. Underwood immediate employment as Chief Radio Operator aboard the Alaska, or in a substantially equivalent position, with all the rights of seniority and other privileges that would have accrued from May 5, 1950, the date of the unlawful discrimination against him, as provided in "The remedy";

(2) Upon request, make available to the Board or its agents for examination and copying all payroll and other records necessary to determine the amount of back pay due under the terms of these Recommendations;

(3) Post in conspicuous places in its office and

places of business in Seattle, Washington, including all places where notices to employees are customarily posted, and in the radio shacks on all vessels owned or operated by it, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by this Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by this Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(4) File with said Regional Director within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, a report in writing, setting forth in detail the steps which this Respondent has taken to comply herewith.

2. American Radio Association, CIO, its officers, representatives, and agents, shall:

(a) Cease and desist from:

(1) Causing Alaska Steamship Company, its officers, agents, successors, or assigns, to refuse to employ any qualified person or to discriminate in any manner in regard to the tenure of employment or any term or condition of employment of its employees for failure to belong to American Radio Association, CIO, except as authorized by Section 8 (a) (3) of the Act; and

(2) In any like or related manner restraining or coercing employees of Alaska Steamship Company,

its successors or assigns, in the exercise of their rights to engage in, or to refrain from engaging in, any or all of the concerted activities guaranteed in Section 7 of the Act.

(b) Take the following affirmative action, which I find will effectuate the policies of the Act:

(1) Post in conspicuous places in its offices in Seattle, Washington, and wherever notices to its members and other radio officers utilizing its employment facilities are customarily posted, copies of the notice attached hereto as Appendix B. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by this Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by this Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(2) Mail to said Regional Director signed copies of the notice attached hereto as Appendix B, for posting, the Respondent Company willing, at the office and places of business of the Company in Seattle, Washington, in places where notices to employees are customarily posted, and in the radio shacks on all vessels owned or operated by the Company. Copies of said notice, to be furnished by said Regional Director, shall, after being duly signed by this Respondent's representative, be forthwith returned to the Regional Director for such posting; and

(3) File with said Regional Director within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, a report in writing, setting forth in detail the steps which this Respondent has taken to comply herewith.

3. The Respondents, Alaska Steamship Company, its officers, agents, successors, and assigns, and American Radio Association, CIO, its officers, representatives, and agents, shall jointly and severally make whole Horace W. Underwood for any loss of pay he may have suffered by the Respondents' discrimination against him, in the manner described in "The remedy."

It is further recommended that unless each of the Respondents, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring it to take the action aforesaid.

It is further recommended that the complaint be dismissed insofar as it alleges that the Respondent Company has violated Section 8 (a) (2) of the Act or has engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) thereof except by the discrimination against Underwood.

It is further recommended that the complaint be dismissed insofar as it alleges that the Respondent Union has engaged in unfair labor practices within

the meaning of Section 8 (b) (1) (A) and (2) except by the discrimination against Underwood.

Dated this 3rd day of July, 1951.

/s/ A. BRUCE HUNT,
Trial Examiner.

Appendix A

Notice to All Employees

Pursuant to the Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not encourage membership in American Radio Association, CIO, or in any other labor organization of our employees, by refusing to employ any qualified person or by discriminating in any manner in regard to the tenure of employment or any term or condition of employment or our employees, except to the extent authorized by Section 8 (a) (3) of the Act.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or

protection, or to refrain from any or all of such activities.

We Will offer to Horace W. Underwood immediate employment as Chief Radio Operator aboard the Alaska, or in a substantially equivalent position, with all the rights of seniority and other privileges that would have accrued to him from the date of our unlawful discrimination against him, and we will make him whole for any loss of pay suffered as a result of the discrimination.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership or non-membership in any labor organization.

Dated.....

ALASKA STEAMSHIP COMPANY.
(Employer.)

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix B

Notice

To All Members of American Radio Association, CIO, to All Other Radio Officers Utilizing the Employment Facilities of This Union, and to All Employees of Alaska Steamship Company:

Pursuant to the Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not cause Alaska Steamship Company, its officers, agents, successors, or assigns, to refuse to employ any qualified person or to discriminate in any manner in regard to the tenure of employment or any term or condition of employment of its employees for failure to belong to American Radio Association, CIO, except as authorized by Section 8 (a) (3) of the Act.

We Will Not in any like or related manner restrain or coerce employees of Alaska Steamship Company, its successors or assigns, in the exercise of their rights to engage in, or to refrain from engaging in, any or all of the concerted activities guaranteed in Section 7 of the Act.

We Will make whole Horace W. Underwood for

any loss of pay suffered as a result of our unlawful discrimination against him.

Dated.....

AMERICAN RADIO ASSSOCIATION, CIO.
(Labor Organization.)

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board

[Title of Causes.]

STATEMENT OF EXCEPTIONS OF RESPONDENT ALASKA STEAMSHIP COMPANY TO INTERMEDIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER

Comes now the Respondent Alaska Steamship Company and files this its Statement of Exceptions to the Intermediate Report and Recommended Order of the Trial Examiner in the above-numbered and entitled causes. Reasons and record references in support of the Exceptions are set forth in the Brief in Support of the Statement of Exceptions filed on behalf of this Respondent. Record refer-

ences in said Brief are to pages only because no line 6; and page 20, footnote 23, lines 14-30).
copy of the Official Transcript.

This Respondent excepts to the following findings, conclusions, statements, recommendations, rulings and omissions of the Trial Examiner and to all findings, conclusions, statements, and recommendations subsidiary thereto:

1. To the finding that the failure to offer Underwood the assignment on the SS Alaska, filled by Lewis A. Deyo, was discriminatory within the meaning of the Act (I.R., page 16, lines 28-31).

2. To the finding that Underwood was unlawfully denied employment on May 5, 1950 (I.R., page 19, lines 24-25).

3. To the finding that the Union did not restore Underwood's name to the national assignment lists following March 29, 1949 (I.R., page 19, footnote 22, lines 60-61).

4. To the finding that Underwood was or would have been entitled to referral to the SS Alaska ahead of Deyo on May 5, 1950, under the principles of rotary hiring (I.R., page 19, lines 35-40).

5. To the finding that Deyo's number on the union assignment list of January 7 was #815, rather than #793 (I.R., page 19, line 43, to page 20, line designations are contained in the Respondent's

6. To the finding that preference in employment was accorded to members of the Union and resulted

in an unlawful denial of employment to Underwood (I.R., page 20, lines 6-8).

7. To the finding that the Company had knowledge of Underwood's union or non-union affiliation at any time material to the case (I.R., page 20, lines 32-48).

8. To the finding that the company discriminated against Underwood in violation of Section 8(a)(3) and (1) of the Act, and that, by causing the company to do so, the Union violated Sections 8(b)(2) and (1)(A) thereof (I.R., page 20, lines 9-12).

9. To the recommendation that the Respondents cease and desist from engaging in unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act (I.R., page 22, lines 41-44).

10. To the recommendation that the Company and the Union jointly and severally make whole Underwood for any loss of pay he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned from May 3 to October 14, 1950 (I.R., page 22, line 51, to page 23, line 4).

11. To the failure of the Examiner to find and recommend that Underwood should not be awarded back pay because his unwillingness to accept employment opportunities amounted to a wilful incurrence of wage loss (I.R., page 23, lines 9-12).

12. To the recommendation that the Company should be required to offer Underwood immediate

employment in the position of Chief Radio Operator aboard the SS Alaska, or to a substantially equivalent position (I.R., page 23, line 28, to page 24, line 3).

13. To the finding that Underwood would have chosen to stand by the Alaska following October 15, 1950 (I.R., page 23, lines 25-28).

14. To the recommendation that the Union and the Company make Underwood whole for any additional loss of pay he may have suffered by the payment to him of a sum of money equal to that which he normally would have earned as wages from the date the Alaska was returned to service after October 15, 1950, to the date of the Company's offer of employment (I.R., page 24, lines 3-8).

15. To the conclusion that by discriminating in regard to the hire and tenure of employment of Horace W. Underwood, thereby encouraging membership in a labor organization, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act (I.R., page 25, lines 13-16, Conclusion of Law No. 2).

16. To the conclusion that by interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act (I.R., page 25, lines 18-21, Conclusion of Law No. 3).

17. To the conclusion that by causing the Com-

pany to discriminate against Underwood in violation of Section 8(a)(3) of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act (I.R., page 25, lines 23-26, Conclusion of Law No. 4).

18. To the conclusion that by restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act (I.R., page 25, lines 28-32, Conclusion of Law No. 5).

19. To each and every recommendation of the Trial Examiner except the recommendations that the complaint be dismissed as to both the Company and the Union insofar as it alleges unfair labor practices other than discrimination against Underwood (I.R., page 25, line 44, to page 27, line 26.)

20. To the failure of the Examiner to recommend and order that back pay, if any, be assessed solely against the Union.

Dated at Seattle, Washington, this 7th day of August, 1951.

Respectfully submitted,

BOGLE, BOGLE & GATES,

By /s/ J. TYLER HULL,
Attorneys for Respondent,
Alaska Steamship Company.

Certificate of mailing attached.

Received August 9, 1951.

Before the National Labor
Relations Board

[Title of Causes.]

STATEMENT OF EXCEPTIONS OF RESPONDENT AMERICAN RADIO ASSOCIATION, CIO, TO INTERMEDIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER

Comes now the Respondent American Radio Association, CIO, and files this, its Statement of Exceptions to the Intermediate Report and Recommended Order of the Trial Examiner in the above-numbered and entitled causes. Reasons in support of the Exceptions are set forth in the Brief filed simultaneously herewith.

Exception is taken to the following findings, conclusions, statements, recommendations, rulings and omissions of the Trial Examiner and to all findings, conclusions, statements, and recommendations subsidiary thereto:

Nature of Exceptions

I.

As to the "Findings of Fact"

1. To the finding that the record does not disclose whether radio officers assigned to vessels after the execution of the 1950 agreement, or other radio officers assigned to positions aboard vessels of the Company were required to be members of the Union as a condition of employment aboard such vessels.

2. To the failure to find that Underwood limited his availability to employment in the industry based

upon job availability and seniority only with and confined to the Alaska Steamship Company.

3. To the failure to find that Underwood's name being numbered 828 on the assignment list of December 31, 1949, and number 796 on the list of January 7, 1950, were related numbers of standing on said lists unconnected with Underwood's membership or non-membership in the Union.

4. In failing to find that Underwood's name was removed from the lists because he preferred to seek employment through other channels.

5. In finding that Underwood's name had been discriminately stricken from the assignment lists of December 31, 1949, and January 7, 1950.

6. In finding that Miller, the Union's Port Agent, conditioned the offer of a job to Underwood aboard the "Flemish Knot" with the requirement that Underwood withdraw a certain charge filed by him with the Board against the Union.

7. In creating the implication that the April 19th letter sent by Miller for the Union to the Company was a recognition that Underwood's claim of discrimination warranted any implication of discrimination.

8. To the finding that the failure to offer Underwood the assignment on the SS "Alaska" filled by Lewis A. Deyo was discriminatory within the meaning of the Act.

9. To the finding that Respondents unlawfully discriminated against Underwood on May 5, 1950,

in the failure to offer him an assignment aboard the SS "Alaska."

10. To the finding that Lundquist for the Union told Underwood that his name did not appear on the national assignment lists because he was not a Union member.

11. In failing to find that the Union offered and Underwood accepted an assignment to a permanent position aboard the SS "Pacificus" at the first moment after Underwood removed the limitations and restrictions as to the kind of job he would accept, which evidenced the absence of any discrimination imposed upon him by the Union.

II.

As to "Conclusion Concerning Underwood"

12. To the finding that Underwood was unlawfully denied employment on May 5, 1950.

13. To the finding that the Union did not restore Underwood's name to the national assignment lists following March 29, 1949.

14. To the finding that Underwood was or would have been entitled to referral to the SS Alaska ahead of Deyo on May 5, 1950, under the principles of rotary hiring.

15. To the finding that Deyo's number on the Union assignment list of January 7 was #815, rather than 793.

16. To the finding that preference in employment was accorded to members of the Union and

resulted in an unlawful denial of employment to Underwood.

17. To the finding that the Company had knowledge of Underwood's union or non-union affiliation at any time material to the case.

18. To the finding that the Company discriminated against Underwood in violation of Section 8(a)(3) and (1) of the Act, and that, by causing the Company to do so, the Union violated Sections 8(b)(2) and (1)(A) thereof.

III.

As to the "Remedy"

19. To the recommendation that the Respondents cease and desist from engaging in unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

20. To the recommendation that the Company and the Union jointly and severally make whole Underwood for any loss of pay he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned from May 3 to October 14, 1950.

21. To the failure of the Examiner to find and recommend that Underwood should not be awarded back pay because his unwillingness to accept employment opportunities amounted to a wilful incurrence of wage loss.

22. To the recommendation that the Company should be required to offer Underwood immediate

employment in the position of Chief Radio Operator aboard the SS Alaska, or to a substantially equivalent position.

23. To the finding that Underwood would have chosen to stand by the Alaska following October 15, 1950.

24. To the recommendation that the Union and the Company make Underwood whole for any additional loss of pay he may have suffered by the payment to him of a sum of money equal to that which he normally would have earned as wages from the date the Alaska was returned to service after October 15, 1950, to the date of the Company's offer of employment.

IV.

As to the "Conclusions of Law"

25. To all of the conclusions of law numbered 2 to 6, inclusive.

V.

As to "Recommendations"

26. To each and every recommendation of the Trial Examiner, except his recommendations that the complaint be dismissed as to both the Company and the Union insofar as said complaint alleges unfair labor practices other than discrimination against Underwood (no exception is taken to the recommendation of the Trial Examiner contained on page 27, lines 29 to 38).

The Respondent Union further takes exception:

27. To the failure to find that there is no evidence that the Respondent Union had any animus

toward Underwood or that it was in any way hostile to him.

Dated: San Francisco, California, August 18, 1951.

Respectfully submitted,

/s/ JAY A. DARWIN,
Attorney for Respondent Union.

Certificate of mailing attached.

Received August 20, 1951.

United States of America
Before the National Labor Relations Board

Cases Nos. 19-CA-277 and 19-CA-358

In the Matter of
ALASKA STEAMSHIP COMPANY,
Employer,
and
HORACE W. UNDERWOOD,
an Individual.

Cases Nos. 19-CB-90 and 19-CB-135

In the Matter of
AMERICAN RADIO ASSOCIATION, CIO,
and
HORACE W. UNDERWOOD,
an Individual.

DECISION AND ORDER

On July 3, 1951, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled

proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner further found that Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended that the complaint be dismissed as to them.[1] Thereafter, the charging party and the Respondents filed exceptions to the Intermediate Report and supporting briefs.

The Board[2] has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs filed by the parties, and the entire record in the case, and hereby adopts the findings,[3] conclusions, and recommendations of the

[1]As no exception has been filed to this recommendation, we shall dismiss the allegations in the complaint relating to these unfair labor practices.

[2]Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

[3]The Intermediate Report contains two inadvertent inaccuracies. It states that "Beginning with April 1, 1950, soon after his latest membership in the Union, Underwood wrote a series of letters to it * * *" The correct date is April 1, 1949. At a later point the Intermediate Report states that "[The Alaska] was laid up from October 1, 1949, to May 2, 1950, when it returned to service for the period ending May 14, 1950." The last date should be October 14, 1950.

Trial Examiner, with the modifications noted below.

1. The Trial Examiner apparently found the effective date of the discrimination against Underwood to be May 5, 1950, the date Underwood was not offered the position of radio officer on the ship Alaska. This resulted, as found by the Trial Examiner, from Underwood's name being discriminatorily stricken from the national assignment list of the Respondent Union. We find that the act of removing Underwood's name from the assignment list in itself constituted discrimination in violation of 8 (a) (1) and (3) of the Act by the Respondent Employer and Section 8 (b) (1) (A) and (2) of the Act by the Respondent Union. However, we agree with the Trial Examiner in his finding that Underwood was also discriminated against on May 5, 1950, and in his setting that date as the date from which Underwood's right to back pay shall run.

2. The Alaska operated from May 5, 1950, to October 14, 1950, at which latter date it was laid up for the winter season. At that time, had Underwood been employed on the ship as radio officer, as it has been found he should have been, he would have been entitled, according to the rules of the Respondent Union, to "stand by" the ship, retaining his right to the radio officer's position when it resumed operation. Or he could have relinquished his position and presumably had his name restored to the Union's assignment lists. The Trial Examiner found that Underwood would have elected to stand by the Alaska and would therefore have had the right to return to it when the ship went back into

operation in the Spring of 1951. The Trial Examiner further found that through the operation of the rules of the Union, Underwood would have automatically have been promoted to the position of Chief Radio Operator on the Alaska. He therefore recommended that the Respondent Company be required to offer Underwood that position or a substantially equivalent one. In our opinion, a finding that Underwood would have attained the position of Chief Radio Operator involves too much speculation as to a series of contingent events to be a proper finding for us to make. We will therefore order that the Respondent Company offer Underwood the position of radio officer aboard the vessel Alaska, or a substantially equivalent position. We do not intend by this modification, however, to change in any way the Trial Examiner's recommendations as to the back pay due Underwood, except to the extent of any differential between the wage rates of a radio officer and a Chief Radio Operator.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

1. Alaska Steamship Company, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Encouraging membership in American Radio Association, CIO, or in any other labor organi-

zation of its employees, by refusing to employ any qualified person because he is not a member of this organization or by discriminating in any manner in regard to the tenure of employment or any term or condition of employment of its employees, for this reason, except to the extent authorized by Section 8 (a) (3) of the Act; and

(2) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.

(b) Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Offer to Horace W. Underwood immediate employment as radio officer aboard the Alaska, or in a substantially equivalent position, with all the rights of seniority and other privileges that would have accrued from May 5, 1950, the date of the unlawful discrimination against him, in the manner provided in the Intermediate Report.

(2) Upon request, make available to the Board or its agents for examination and copying all payroll and other records necessary to determine the amount of back pay due under the terms of this Order;

(3) Post in conspicuous places in its office and places of business in Seattle, Washington, including all places where notices to employees are customarily posted, and in the radio shacks on all vessels owned or operated by it, copies of the notice attached to the Intermediate Report and marked "Appendix A."[4] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by this Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by this Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(4) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent Company has taken to comply herewith.

2. American Radio Association, CIO, its officers, representatives, agents, successors and assigns, shall:

(a) Cease and desist from:

(1) Causing Alaska Steamship Company, its

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[4]This notice, however, shall be, and it hereby is amended by striking from line 3 thereof the words "The Recommendations of a Trial Examiner" and substituting in lieu thereof the words "A Decision and Order." In the event that this order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

officers, agents, successors, or assigns, to refuse to employ any qualified person or to discriminate in any manner in regard to the tenure of employment or any term or condition of employment of its employees for failure to belong to American Radio Association, CIO, except as authorized by Section 8 (a) (3) of the Act; and

(2) In any like or related manner restraining or coercing employees of Alaska Steamship Company, its successors or assigns, in the exercise of their rights to engage in, or to refrain from engaging in, any or all of the concerted activities guaranteed in Section 7 of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) At an appropriate time and upon his request and proper application, restore Horace W. Underwood to its assignment lists in conformance with its rules, and refer him to assignments in accord with his proper place on those lists and without discrimination in any manner, except as authorized by Section 8 (a) (3) of the Act;

(2) Post in conspicuous places in its offices in Seattle, Washington, and wherever notices to its members and other radio officers utilizing its employment facilities are customarily posted, copies of the notice attached to the Intermediate Report and marked "Appendix B."[5] Copies of said notice to

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[5]See footnote 4.

be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by this Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by this Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(3) Mail to said Regional Director signed copies of the notice attached to the Intermediate Report and marked "Appendix B," for posting, the Respondent Company willing, at the office and places of business of the Company in Seattle, Washington, in places where notices to employees are customarily posted, and in the radio shacks on all vessels owned or operated by the Company. Copies of said notice, to be furnished by said Regional Director, shall, after being duly signed by this Respondent's representative, be forthwith returned to the Regional Director for such posting; and

(4) Notify the Regional Director for the Region in writing, within ten (10) days from the date of this Order, what steps the Respondent union has taken to comply herewith.

3. The Respondents, Alaska Steamship Company, its officers, agents, successors, and assigns, and American Radio Association, CIO, its officers, representatives, agents, successors, and assigns, shall jointly and severally make whole Horace W. Underwood for any loss of pay he may have suffered by the Respondents' discrimination against him, in the manner described in the Intermediate Report.

It Is Further Ordered that the complaint be dismissed insofar as it alleges that the Respondent Company has violated Section 8 (a) (2) of the Act or has engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) thereof except by the discrimination against Underwood.

It Is Further Ordered that the complaint be dismissed insofar as it alleges that the Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) except by the discrimination against Underwood.

Signed at Washington, D. C., February 11, 1952.

JOHN M. HOUSTON,
Member;

ABE MURDOCK,
Member;

PAUL L. STYLES,
Member,

[Seal] NATIONAL LABOR RELATIONS BOARD.

Before the National Labor Relations Board,
Nineteenth Region

Case Nos. 19-CA-277 and 19-CA-358

In the Matter of:

ALASKA STEAMSHIP COMPANY

and

HORACE W. UNDERWOOD (an Individual).

Case Nos. 19-CB-90 and 10-CB-135

AMERICAN RADIO ASSOCIATION, CIO,

and

HORACE W. UNDERWOOD (an Individual).

PROCEEDINGS

Pursuant to notice the above-entitled matter came on regularly for hearing at the hour of 10:00 o'clock a.m.

Before: A. Bruce Hunt, Trial Examiner.

Appearances:

SANFJORD B. TEU, II,
National Labor Relations Board,
Washington, D. C.,

Appearing for the General Counsel of the Board.

JOHN GEISNESS, of
BASSETT & GEISNESS,

Appearing for Charging Party, Horace W. Underwood.

J. TYLER HULL, of
BOGLE, BOGLE & GATES,

Appearing for Respondent Alaska Steamship Co.

JAY A. DARWIN,

Appearing for Respondent American Radio Association, CIO.

* * *

Monday, February 26, 1951

DALLAS HUGHES

called as a witness on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows: [56*]

* * *

Cross-Examination

By Mr. Darwin:

Q. Mr. Hughes, you heard Mr. Underwood tell Mr. Lundquist that he was now available for permanent or temporary assignment on the Alaska Steam, did you not? A. Yes.

Q. And it is a fact that Mr. Underwood said,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Dallas Hughes.)

"Yes, from now on I am available for temporary work." That is correct, [65] isn't it?

A. I believe that is correct.

Q. Were you there during all the time that Mr. Underwood was talking to Mr. Lundquist?

A. I am pretty sure I was there during the entire conversation.

Q. By the way, your status for some time has been non-membership in this union, too, hasn't it?

A. Yes, sir.

Q. It is a fact, isn't it, Mr. Hughes, that you have sailed on three vessels by assignment through this Seattle port, between August 8, 1950, and the present date—isn't that right?

A. Yes, that is true. [66]

* * *

Q. (By Mr. Darwin): Do you know that in addition to the national list which the ARA promulgates each week, we have also port lists, do we not? A. Yes, sir.

Q. And you knew also that you were on the port list, did you not?

A. I understood that I was on the port list, yes.

Q. You knew also that this Underwood was on the port list, did you not? A. Yes. [67]

* * *

Q. (By Mr. Darwin): Now, when you came to the union hall for a position as a non-member, did you register?

A. I understood that I was registered, yes. [71]

(Testimony of Dallas Hughes.)

* * *

Q. And you were sent out on a vessel on or about that date through the hiring hall?

A. Yes, sir.

Q. Now, you are familiar with the application—employment application blanks which are referred to as official assignment cards? A. Yes.

Q. That you have to fill out? A. Yes. [72]

* * *

Q. Now, on August 3, 1950; September 29, November 16, and December 9, 1950, and February 21, 1951, you were so assigned to ships, weren't you, by following that system? [73]

* * *

A. Yes. [75]

* * *

HORACE W. UNDERWOOD

the charging party, called as a witness on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows: [88]

* * *

Direct Examination

By Mr. Teu:

Q. What is your occupation, Mr. Underwood?

A. Radio operator.

Q. How long have you been a radio operator?

A. Since 1914.

Q. 1914? A. Yes.

(Testimony of Horace W. Underwood.)

Q. Are you a licensed operator?

A. Pardon?

Q. Are you a licensed radio operator?

A. Yes, sir; that is correct.

Q. By whom are you licensed?

A. By the Federal Communications, and by the United States Coast Guard.

Q. How long have you held an F.C.C. license?

A. Since 1914.

Q. How long have you held a United States Coast Guard certificate?

A. I believe it has been since 1948—isn't that right, Carl? [89]

* * *

Q. Are you now or have you ever been a member of ARA?

A. I have been a member of ARA. I resigned in November of 1949.

* * *

Q. (By Mr. Teu): What were the circumstances under which you resigned?

A. Well, after one year's time, I was not able to have anything but bad luck. My employment seemed to be just the way that you spin a roulette wheel. I waited five months on the beach to get an Alaska steamship, and then I was assigned to the Coastal Rambler, which normally would run all summer—— [93]

* * *

Q. (By Mr. Teu): Go ahead.

(Testimony of Horace W. Underwood.)

A. Then suddenly after four months' work this ship was laid up with cargo on the dock marked for the Coastal Rambler, and I asked the skipper and numerous ship heads why. It didn't make sense to me.

And they said because of the four months' time agreement with the Maritime Commission, they would have to charter the ship for four months more, and probably they would only need it for two months more, and they didn't want to charter it for four months, when they only would need it for two months. [94]

* * *

A. Well, I was not allowed to stand by this ship—this Coastal Rambler, although I can prove that I intended—I was not allowed to stand by because I applied for unemployment insurance and they said that I could not. So I had to sign off there for drawing this government unemployment insurance. And that is when I wrote to O'Rourke asking him what I could do about it.

* * *

Q. My question was, under what circumstances did you resign from the A.R.A.? [95]

A. Well, that was the start of it.

Q. Go ahead.

A. Then when I lost the Coastal Rambler, they asked me to take a relief job on the Palisana——

Q. (Interposing): I want to ask this question here, and then resume your narrative.

(Testimony of Horace W. Underwood.)

Were you on the Seattle branch seaman list at this particular time?

A. I was. I was number eleven on the local list.

Q. Were you on the national list?

A. I don't remember my exact national list number, but on the local list I was No. 11

Q. Were you on the national list?

A. Yes, sir.

Q. Go ahead and tell us the circumstances.

Mr. Darwin: Do we have the date fixed?

The Witness: Yes.

Mr. Darwin: For the Coastal Rambler?

Trial Examiner Hunt: You were No. 11 on the local list, you say?

The Witness: At the time that I accepted a job on the Palisana.

Trial Examiner Hunt: What was the date of that?

The Witness: The date of that was September 11th. I have my government book here, which shows that. [96]

* * *

Trial Examiner Hunt: The witness has produced a book which bears a number underneath his name on the front cover, and also the seal of the Department of Commerce. The book is entitled, "Continuous Discharge Book," and the witness is referring to an entry MS Coastal Rambler, and the date is 2 April 1949, Seattle, Washington.

There are two more entries immediately below involving the same ship, the entries being one of May 4, 1949, and another of June 1, 1949.

(Testimony of Horace W. Underwood.)

And then there are two Palisana entries immediately below that, which conclude the entries in this book, and they are [97] dated September 11, 1949, and October 21, 1949.

* * *

Q. (By Mr. Teu): Go ahead.

A. They asked me to accept that job on the Palisana, and I said, "Well, you offer it to everybody in the hall, and if no one accepts it, I will relieve this fellow." I didn't accept that until every man in the hall refused to relieve this man. He had to go to the hospital, and he was going to lose his license. He would have to take his examination again.

I made two trips on it, and the old bylaws used to read that when a man placed his name on that list, that job goes to that man; but then the men didn't even know that [98] under the new bylaws——

Trial Examiner Hunt (Interposing): Just wait a minute. You have a tendency to give us a very wide answer covering every detail, and if counsel want details, they will ask you for them.

You are asked now to give us your testimony of the circumstances concerning your resignation from the ARA.

The Witness: That is it. My indignation over the treatment that I was getting in the ARA was gradually building up all the time to the point where I got so mad that I resigned. [99]

* * *

(Testimony of Horace W. Underwood.)

Trial Examiner Hunt (Interposing): Wait just a minute.

You took two assignments on the Palisana?

The Witness: Two voyages.

I signed articles for each voyage.

Trial Examiner Hunt: The first one was from September 11th to October 29, 1949?

The Witness: Yes, sir.

Trial Examiner Hunt: And the second from October 21 to November 21, 1949, according to this book that you have produced?

The Witness: That is right.

Trial Examiner Hunt: Your point is that the rules were changed so that the radio operator or officer, whom you relieved on those voyages, when he could not get back to the ship——

The Witness: That is right.

Trial Examiner Hunt: ——to maintain his position as a permanent one, you thought that it should have been given to you as a permanent one? [100]

The Witness: Yes.

Trial Examiner Hunt: But because of some change in rules, you could not obtain it as a permanent one?

The Witness: That is right.

Trial Examiner Hunt: And you felt aggrieved because for each week that you were on this ship on these two voyages your place on the assignment list dropped 30 positions?

The Witness: Each week. It dropped so far down that without the Korean war I would not have

(Testimony of Horace W. Underwood.)

been employed on the Alaska ships until this spring of 1951.

Trial Examiner Hunt: Is there anything else in connection with your grievances against the union which caused you to resign?

The Witness: That is the main thing.

Trial Examiner Hunt: All right, sir.

Q. (By Mr. Teu): Now, you resigned, I believe you said in December of 1949 from the ARA, is that right? A. That is correct. [101]

* * *

Q. And you had no work insofar as the ARA is concerned since the last voyage on the Palisana, is that correct?

A. Well, he offered me this assignment that Dallas Hughes is on now—that relief job.

Q. When did he offer that?

Trial Examiner Hunt: When the witness says, "he offered me," he pointed to whom?

The Witness: Carl Lundquist.

Trial Examiner Hunt: All right.

Q. (By Mr. Teu): When did he offer you that assignment?

A. Well, just let me see now. I have the telegram here.

Q. Refer to it and refresh your memory.

A. I believe this is it (indicating).

Q. When did he offer you the assignment on the China Mail, the ship which Mr. Hughes is on?

A. It is dated February 19, 1951. [105]

Q. At that time had you received a notice of this hearing? A. Yes, sir; I had.

(Testimony of Horace W. Underwood.)

Q. Were you under subpoena at that time to appear at this hearing?

A. You told me that I would be subpoenaed. I am not sure whether you had actually given me a subpoena or not. But you said that I could consider myself under a subpoena.

Q. You were advised that you would be subpoenaed? A. Yes, sir.

Trial Examiner Hunt: Let us get this clear. I don't suppose there will be any objection by other counsel to stating for the record that the witness has produced a telegram addressed to the witness, reading as follows:

"Expect Coastwise Relief Trip About 12 Days. Available Tomorrow or Wednesday. Advise if Interested."

And that is signed, "Lundquist."

The telegram is dated February 19, and bears the notation that it was read to the addressee on the morning of February 19, 1951.

And that telegram was sent by Mr. Lundquist—is that correct?

Mr. Darwin: Yes. We are going to offer it in evidence at the proper time.

Q. (By Mr. Teu): Did you refuse that offer?

A. I explained to Carl that I would have to come to this [106] hearing, and if he could not locate anyone, I would locate him one.

Q. Is that the only assignment or offer that was made to you from 1949 until this offer was made?

A. No. He offered me a job available in the Mili-

(Testimony of Horace W. Underwood.)

tary Sea Transport Service. Of course he doesn't have a contract there, and they do not have anything to do with those jobs. Anybody can go down there and apply for that job.

Q. With respect to the jobs that the ARA has anything to do with, has the ARA offered you an assignment from 1949 until the time of the telegram that was just read into the record by the Trial Examiner? A. Ralph Miller called me up——

Q. Who was he?

A. He was the predecessor of Mr. Lundquist. He was the business agent before Mr. Lundquist.

Mr. Darwin: Port agent.

Trial Examiner Hunt: Mr. Lundquist, when did you assume your duties as port agent?

Mr. Lundquist: September 13, 1950.

Trial Examiner Hunt: And he was port agent prior to that time?

Mr. Lundquist: Yes, sir.

Trial Examiner Hunt: Now, you may proceed.

The Witness: Ralph Miller offered me a job on a Northwest [107] Airlines plane.

It required 80 hours flying time. I have no flying time. I have experience with airplane transmitters, but I have no flying time.

Q. Does the ARA have anything to do with the assignment of radio operators to airplanes?

A. No.

Q. Has the ARA since 1949—the last assignment that you had—until the assignment that you

(Testimony of Horace W. Underwood.)

had in this telegram, offered you an assignment on a ship?

A. None other than the one I just told you about.

Q. Had they offered you an assignment on any ship during that period?

A. It may have been possible that Ralph Miller offered me a temporary job on the Baranof—just 12 days.

Q. You say that it may have been possible?

A. I am not sure; he may have called me. Of course I told him that I would not accept, because accepting a relief job means that you are out of luck for getting a permanent job. Your name goes down 30 places each week, and with the large beach list, you are always behind the eight-ball.

Q. Would you have refused a job had you been offered one?

A. I never would refuse an offer of a permanent job with the Alaska Steam.

Q. Can you refuse an assignment by the ARA if you want to? [108]

A. Yes. Any man in the ARA has that privilege. He can turn down all of them and he can hang on to his place on the list for an indefinite period.

Q. Were you available for an assignment during the period of 1949 until the date of the telegram which has just been referred to in the record?

A. Yes. Even while I was at the cannery, the superintendent would have let me leave if I could get a permanent job with the Alaska Steam, because they had another radio man there—in fact, two of them.

(Testimony of Horace W. Underwood.)

Q. Where were you working in Alaska?

A. Kake, Alaska.

Q. Was there any means by which the ARA could advise you of an assignment that was available? A. Yes. [109]

* * *

Trial Examiner Hunt: General Counsel's 2, 3 and 4 are received in evidence.

(General Counsel's Exhibits Nos. 2, 3 and 4 are received in evidence.) [160]

* * *

We will now recess until March 26, 1951, in this hearing room, at 9:30 o'clock a.m.

(Whereupon at 3:15 o'clock p.m. on February 27, 1951, the hearing was adjourned until 9:30 o'clock a.m. March 26, 1951, at the same [166] place.)

* * *

Mr. Hull: Mr. Examiner, there are two things you neglected to do, I think, at the close of the hearing last time. I will be very brief, but I would like it understood, and I now so move, that the answer of respondent Alaska Steamship Company in this case be deemed amended to deny the allegations of the amended complaint.

Trial Examiner Hunt: I assume there will be no objection to that motion, and I grant it. [177]

* * *

LEONARD C. WESSON

recalled as a witness on behalf of the General Counsel, having been sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Teu:

Q. Where are you employed?

A. By the Alaska Steamship Company.

Q. What are your duties there?

A. I am the Chief Clerk in the Operating Department, and as such I do general work in that office, including the maintenance and supervision of employment practices for the seamen employed by the Alaska Steamship Company. [183]

* * *

Q. Mr. Wesson, you agreed to produce at the hearing certain documents which I requested you to produce, is that right?

* * *

Q. Will you produce them, please?

(Mr. Hull hands documents to witness.)

A. Mr. Teu asked that we provide an abstract of the employment record of each radio operator employed on each of our vessels, or each vessel operated by the Alaska Steamship Company, commencing with the period of October 1, 1949, to the date he called me, a date of February——

Q. Around the 20th of February, I believe?

A. February 20, 1951.

(Testimony of Leonard C. Wesson.)

Mr. Teu: Mr. Examiner, I would like to have this document which I hand the reporter marked for identification as GC Exhibit 7.

(Document above referred to marked for identification as General Counsel's Exhibit No. 7.)

Q. Mr. Wesson, the document marked for identification GC Exhibit 7 is what? Describe it briefly. [184]

A. This is an abstract of the employment record of radio operators on board each of our vessels or each vessel owned or operated by the Alaska Steamship Company during the period October 1, 1949, through the period to that date in February on which we agreed as approximately [185] February 20.

* * *

(Document heretofore marked General Counsel's Exhibit No. 7 for identification, received in evidence.) [187]

* * *

Cross-Examination

By Mr. Hull:

* * *

Mr. Teu: Pardon me. I have just one question I would like to ask before you take up your cross-examination, if I may? [188]

* * *

Mr. Teu: Do you know if all the radio operators,

(Testimony of Leonard C. Wesson.)

that is, the Chief, First Assistant and Second Assistant, whose names appear on GC Exhibit 7 are members of the ARA?

The Witness: No.

Mr. Teu: You don't know, or you know they are or are not?

The Witness: I don't know.

Q. (By Mr. Hull): Mr. Wesson, in connection with this exhibit, first of all, with respect to the SS Alaska, which appears on the first page of the exhibit, I notice that the first voyage, Voyage No. 21, was on May 6, 1950, but there is no previous voyage in 1949 listed for the Alaska.

Now, will you explain why that is?

A. The SS Alaska was laid up on October 1, 1949. Mr. Teu in his request requested this record reflect information commencing on October 1, 1949. However, the information for the last voyage in 1949 I have available.

Q. Yes; I wonder if it would give it to us for that voyage?

A. The SS Alaska sailed on its last voyage in 1949 on September 14, 1949. The payroll for the period September 12, 1949, to and including September 30, 1949, carried as Chief Radio Operator the man named Albert F. Dittberner; the First Assistant Operator was George D. Johnston; the second [189] Assistant Radio Operator was Jesse D. Sneff.

Q. Mr. Wesson, you said the SS Alaska laid up

(Testimony of Leonard C. Wesson.)

following October 1, 1949. What did you mean by that?

A. Certain vessels are withdrawn from service each year after termination of what we call our busy season, which is the season of passenger and tourist traffic, and the heavy movement of salmon from Alaska.

Q. And by "laid up" do you mean the vessel was in an inactive status?

A. Yes, she was completely shut down with no crew aboard, and only watchmen stationed on board the ship. [190]

* * *

Q. Does the Alaska Steamship Company operate all its passenger and freight vessels throughout the year? A. No.

Q. Will you describe the operation of those vessels a little bit?

A. The Alaska Steamship Company operates two passenger vessels the year around. The remainder of the fleet is kept in reserve and operated either as fill-ins during that period or to accommodate the tourists and passenger business in the summer season. [201]

Cross-Examination

By Mr. Darwin:

* * *

Q. When a man is on standby, you normally don't call into the union hall for any replacement for that vessel when it sails again?

(Testimony of Leonard C. Wesson.)

A. If the man is on employed status, we assume the employment is continuing unless he advises us to the contrary.

Q. That is right. Unless he advises you to the contrary, there is no occasion for a telephone call to the union employment office for [203] replacement? A. That is correct.

Mr. Hunt: Let's see. I think I know what you are driving at. Take the first page of the exhibit again.

In other words, from the date of May 3, 1950, to October 14, 1950, in connection with the SS Alaska, there is no occasion for the company to contact the union with respect to getting a radio operator?

The Witness: That is correct.

Q. (By Mr. Darwin): And that would generally and similarly be true with respect to General Counsel's Exhibit 7 as to radio operators aboard other vessels—that is correct, isn't it?

A. Yes.

* * *

Redirect Examination

By Mr. Teu:

Q. With respect to the terms you used on cross-examination, Mr. Wesson, "Alaska trade" and "ocean trade" or "offshore trade"—I am not sure what—I am not sure I understand what you mean. Is this true, that offshore is the coast-wise trade?

Mr. Darwin: Oh, no.

(Testimony of Leonard C. Wesson.)

A. The Alaska Steamship Company is a steamship company engaged primarily in transporting passengers and cargo by ships between the United States and Alaska—from the [204] continental United States to Alaska or between different ports in Alaska or between Alaska and the United States.

Q. That is not coast-wise trade?

A. No, sir.

Q. Is that ocean trade?

A. I might inject here to clarify what has actually occurred. The fact is that the Alaska trade is a seasonal trade, and at certain times we find ourselves with a surplus of ships. Then we have the option of either laying the ships up or finding employment for the ships in other trades than the Alaska trade. These vessels that are employed in the offshore trade are the ships that might be referred to or which can be designated as our surplus, and would be either laid up or employed in this other trade.

Trial Examiner Hunt: The term "Alaska trade" has reference to business between the continental United States and points in Alaska or points in Alaska to the United States, vice versa?

The Witness: That is right. [205]

* * *

HORACE W. UNDERWOOD

a witness called on behalf of General Counsel, having been previously sworn, was recalled and testified further as follows: [209]

Direct Examination

By Mr. Teu:

* * *

Q. Mr. Underwood, did you on or about December 23, 1949, make application to the Alaska Steamship Company for employment?

A. Yes, I did.

Q. How did you make application for employment? A. I wrote a letter to Mr. Felton.

Q. Who is Mr. Felton?

A. Mr. Felton is Port Engineer for the Alaska Steamship [210] Company, and he has charge of radio operators also.

Q. Did you make a copy of the letter in which you made application to Mr. Felton for a job with the Alaska Steamship Company?

A. Yes, I do.

Mr. Teu: Mr. Examiner, I would like to have this document marked as GC Exhibit 8 for identification.

* * *

Mr. Darwin: I object to its introduction on the ground that it is self-serving and contains the writer's conclusions as to the legality or illegality of the bylaws. This is the first time I have seen any claim about the ARA's bylaws being illegal.

Trial Examiner Hunt: Let us see what the pur-

(Testimony of Horace W. Underwood.)

pose of the offer is. It might be that your objection is premature. Do you just want to show he made application to the company for employment?

Mr. Teu: Right. And I certainly can trust the Examiner to separate the wheat from the chaff, if any, in this letter. The purpose is to show he made application for a job with the Alaska Steamship Company. [211]

Trial Examiner Hunt: I think it is admissible for that purpose, Mr. Darwin.

Mr. Darwin: Limited to that, all right.

Mr. Hull: I object to the document on the ground that it is immaterial and irrelevant to any issue in the case, and I join in Mr. Darwin's objection. I understand that the Examiner has limited the purpose of the offer to the matter stated.

Trial Examiner Hunt: I think Mr. Teu himself limited it.

Mr. Teu: I specifically limited it.

Trial Examiner Hunt: Have you offered it?

Mr. Teu: It has not been identified yet. I offer it as GC Exhibit No. 8.

* * *

Trial Examiner Hunt: I will receive it in evidence as General Counsel's Exhibit 8. Do you have a duplicate?

Mr. Teu: I will have some duplicates made.

Trial Examiner Hunt: We will dispense with the duplicate. The document is dated December 23, 1949. It contains [212] the address Vashon, Wash-

(Testimony of Horace W. Underwood.)

ington with the date appearing in the upper right-hand corner. It is addressed to Mr. M. Felton, who has already been identified in the record as an employee of the respondent company.

Insofar as pertinent to the offer, it reads as follows:

"I take this opportunity to make application to you for retention of my job as 'radio operator' on the 'MS Palisana' which I was forced to relinquish a short time ago on account of the temporary lay-up of this vessel."

It is signed by the witness and gives his telephone number. I think that identification makes it unnecessary to have a duplicate made.

(General Counsel's Exhibit No. 8 previously marked for identification, received in evidence.)

Q. (By Mr. Teu): Did you receive any response from the application by letter for employment by Alaska Steamship Company?

A. No.

Q. You did not. Did you again on or about December 29, 1949, make application to the Alaska Steamship Company for employment?

A. Yes, I did.

Q. How did you make that application for employment?

A. I went to Mr. Felton's office at Pier 42. [213]

Q. If you know, is that the office of the Alaska Steamship Company? A. It is.

Q. You saw Mr. Felton? A. I did.

(Testimony of Horace W. Underwood.)

Q. Did you have any conversation with him?

A. I had a short conversation with him, and he gave me an application blank.

Q. An application blank for what purpose?

A. Employment as radio officer. [214]

* * *

Q. (By Mr. Teu): What did you do with the application blank?

A. I filled it out and returned it to Mr. Felton.

Q. Where did you hand Mr. Felton the executed application blank? A. In his office.

Q. At Pier 42? A. Pier 42, Seattle.

Q. Did you ever hear anything further with respect to that application for employment?

A. I received a letter three months later. [216]

* * *

Trial Examiner Hunt: I will receive it.

(Documents previously marked for identification as General Counsel's Exhibit No. 10 were received in evidence.)

Mr. Hull: Am I to understand you are receiving these two exhibits, GC 9 and 10, under the stipulation that these were letters sent by the company to Mr. Underwood and to the union, and received by both parties?

Trial Examiner Hunt: That is my understanding of the stipulation on foundation. Do you have copies? [220]

* * *

(Testimony of Horace W. Underwood.)

Trial Examiner Hunt: Exhibit No. 10 has been admitted. I will receive Exhibit No. 9.

(Document previously marked for identification as General Counsel's Exhibit No. 9, received in evidence.)

Q. (By Mr. Teu): Mr. Underwood, did you at any time after December 29, 1949, make application to the Alaska Steamship Company for employment? [221]

* * *

A. Yes, from December 29, 1949, up to June 1, 1950.

Q. How did you ask Alaska Steamship Company for a job?

A. I wrote at least six letters to Mr. Zumdieck.

Q. Did you receive any response?

A. No, I did not.

Q. You did not receive a response to any of your letters? A. No.

Q. Did you after June 1, 1950, or thereabouts make application or ask Alaska Steamship Company for a job?

A. I don't believe so after June 1, because all the freighters were out and they did not have any jobs anyway.

Q. What do you mean, "were out"?

A. They had sailed for the season. It is seasonal work, and the Victoria and the Ring Splice were the only two left, and they went out along about that time or shortly after, and there wasn't

(Testimony of Horace W. Underwood.)

any more vessels or jobs with the Alaska Steam.

Q. Were you available during that period of time, December 23, 1949, to around June 1, 1950, for assignment on employment [222] as a radio officer by Alaska Steamship Company?

* * *

A. Yes, I was. [223]

* * *

Trial Examiner Hunt: It is not testimony. Let us see whether the witness had contact with the ARA with respect to the assignment, and let us see what happened. In November or December, 1949, did you contact ARA?

The Witness: On December 1, 1949, in the ARA office in [228] Seattle, I filled out an active list assignment slip.

Q. You executed such a document?

A. I did.

Q. What did you do with with it after you executed it?

A. I mailed it to Mr. Walker of the NLRB.

Q. You executed an application with ARA to go on the assignment list. What did you do with it?

A. There are several copies. One copy goes to the fellow who is making application, and the other copy goes to the main office in New York. I took one copy and left the other copies there.

Q. Now, Mr. Underwood, did you have any contact with ARA on or about April 16, 1950?

A. April 16, 1950?

(Testimony of Horace W. Underwood.)

Q. Yes. A. Yes.

Q. Tell us nature of that contact?

A. There was a cannery radio operators' meeting in the Frye Hotel, right across the street here, and Ralph Miller came to that meeting.

Q. Who is Ralph Miller?

A. Ralph Miller was Business Agent for the ARA, Seattle Branch, just prior to Mr. Lundquist.

Q. Did you have any conversation with Mr. Miller? A. I did. [229]

Q. Where? A. In the Frye Hotel.

Q. In Seattle, Washington?

A. Seattle, Washington.

Q. Was there anyone present at the time you and Mr. Miller had that conversation?

A. No, not while I was talking to Ralph.

Q. Tell us in your own words what the substance of the conversation was.

A. He said I would be put on the Flemish Knot of Alaska Steamship Company, provided I would withdraw the NLRB charges I filed against the ARA, and that he would hold a membership meeting, an ARA membership meeting, the following Wednesday, to determine if they would take me back into the union.

Q. Is that all the conversation you had with him? A. That is all.

Q. Were you given an assignment on the Flemish Knot, the ship you just testified about?

A. No; may I change that a bit—that was not quite all the conversation.

(Testimony of Horace W. Underwood.)

Q. Go ahead and tell all the conversation.

A. I called his attention to the fact that the Flemish Knot could possibly make a three weeks' trip to Alaska and come back and lay up, and I would not have any case, and I [230] would not have any job.

I said, if they will guarantee me six months' work on this Alaska run in the summer——

Mr. Darwin: The union?

The Witness: The union.

A. ——if they would guarantee six months' work, I would accept it.

Q. What did he say?

A. He did not say anything.

Q. Were you given an assignment on that ship?

A. He said he would take it up with the membership meeting, but he didn't say anything further than that.

Q. Were you given an assignment on the ship that you just referred to?

A. I did not hear from him on Wednesday. I told him I would be home all day on the Wednesday they were supposed to have the meeting, but I did not hear from him.

Q. Did you ever hear anything further from Mr. Miller?

A. Yes, just before I left for Kake, I was talking with him on the phone, and he offered me a job on an airplane, but I did not have the necessary flying time.

(Testimony of Horace W. Underwood.)

Q. Do you know when this offer of an airplane job was made?

A. Well, I went to Kake on July 23. It was before that. I don't recall the exact date. [231]

* * *

Q. Mr. Underwood, do you know Mr. Carl Lundquist? A. Yes, I do.

Q. Did you have any conversation with Mr. Lundquist on or about December 12, 1950?

A. December 13, when I went to his office.

Q. December 13, 1950. Where was his office located at that time?

A. It was in the Arcade Building.

Q. Do you know what position Mr. Lundquist occupies in that office?

A. He is the Seattle business agent for the ARA.

Q. You had a conversation with him in the office of ARA December 13, 1950? A. Yes.

Q. Who was present during the conversation you had with him?

A. Dallas Hughes was present.

Q. Any other person present when you had that conversation with Mr. Lundquist?

A. I believe Frank Homan came in near the end of it.

Q. Who is Mr. Homan?

A. He is a radio operator. [232]

Q. Now, will you tell us in substance what conversation you had with Mr. Lundquist on that date?

A. Well, I told him that I did not understand

(Testimony of Horace W. Underwood.)

his statement over the telephone the day before, in which he said that my name was right on the bottom of the list, where it belonged.

Q. Did you talk with him over the telephone on December 12 before you went to see him?

A. Yes.

* * *

Q. He was referring to the conversation with you on December 12th?

A. Yes, he admitted it; he said he found he was in error; that my name was not carried on the regular assignment list at all.

Q. Did he say anything further about the regular assignment list?

A. Yes, he said, "We have the active, the inactive, and the employed, and the deferred, the

* * *

Questions by Trial Examiner Hunt

Q. Did Mr. Lundquist tell you the nature of this extra list?

A. He said I was on this list, and I was not on the bottom of this particular list he mentioned.

Q. The extra list? A. The extra list.

Q. Did he say you were on the extra list?

A. I believe he called it an extra list; I am not sure he had a specific name for it.

Q. Did he state what kind of a list it was? permit card, and this extra list." [233]

A. No, he did not, as I recall it.

(Testimony of Horace W. Underwood.)

Direct Examination
(Resumed)

By Mr. Teu:

Q. Was there any conversation with respect to your registration with the ARA?

A. Oh, yes; I talked with Mr. Lundquist quite a while, [234] and I reviewed the whole case.

Q. What was the conversation?

A. Well, I tried to show him how I had been discriminated against.

Q. Did you tell Mr. Lundquist you had registered with the NRA?

(Colloquy off the record.)

Q. You told him you had registered?

A. Yes, I did.

Q. Before, on December 12, had you, during the conversation with Mr. Lundquist on the telephone made any reference to your registration?

A. Yes, I told him.

* * *

A. He said, "Yes, I know; I can't discriminate against you, and I also can't discriminate against my other members." [235]

* * *

Q. Go ahead.

A. I referred to the Coastal Rambler case in which I lost the ship because I abided by a government rule.

Trial Examiner Hunt: Did you tell Lundquist

(Testimony of Horace W. Underwood.)

you had lost the job because you abided by a government rule?

The Witness: Yes.

Trial Examiner Hunt: Don't tell anything except what you told him.

The Witness: That I lost the job because I abided by a government rule. I couldn't stand by a vessel while drawing unemployment insurance, so I had to give up my standby on the Coastal Rambler with ARA.

Q. (By Mr. Teu): Was there any conversation with respect to your place on the ARA registration list?

A. Well, yes, I asked him why I did not have a number the same as all the rest of them, and he said I didn't have a number because I was not a member.

Q. Was there any conversation with respect to the national listing? A. Yes.

Q. Tell us about that conversation.

A. Well, there wasn't very much of importance after that. [237]

Q. Did you have any conversation with Mr. Lundquist with respect to the national list of ARA?

A. Just what I told you. I asked him why I was not on the national list, and he said I was not on the national list because I was not a member.

Q. Was there any conversation with respect to the Seattle Branch list? A. Yes.

Q. What was that conversation?

A. Well, he had the list there. He said he had

(Testimony of Horace W. Underwood.)

me on the list. He said, "You are on the list—on the local list here."

Q. Did you ask him as to what your number was?

A. I did ask him that. That is when he answered the question that I did not have a number.

Q. Mr. Underwood, you referred to the Coastal Rambler job. At what time did this incident with respect to that ship occur?

A. It occurred on—you mean when the ship laid up?

Q. Yes.

A. That was right around the first of August.

Q. What year? A. That was in 1949. [238]

* * *

Direct Examination
(Continued)

By Mr. Geisness:

Q. Between December 1, 1949, and December 1, 1950, did Alaska Steamship Company itself offer you any jobs?

A. No, sir, they did not. [239]

* * *

Q. (By Mr. Geisness): Besides those two offers of jobs through the ARA that I just mentioned, did you get any other offers of jobs through ARA between December 1, 1949, and December 1, 1950?

A. Since they mentioned the Baranof, I remember now that they did offer me a relief job on the

(Testimony of Horace W. Underwood.)

Baranof, as the relief job was no good for any radio man——

Q. When was that?

A. I don't remember the date, because I had already told them I was not available for a relief job.

Q. Do you remember the approximate time?

A. No, it was in between the period you mentioned.

Q. Were there any others, other offers made by ARA of a job?

A. I had one offer of a job. It was not official. They called me—Clyde Bowen called me at the time. He acted as Miller's secretary, an unofficial secretary. He called me and told me that they had an old rustpot bound for Honolulu [240] that everybody else had turned down. He said, "Would you be interested in it?" I said, "No, I wouldn't, but if you force it on me, I suppose I will have to take it, because I am drawing unemployment insurance." He said, "Just forget I called you."

Q. Was that during the period I mentioned?

A. Yes.

* * *

Mr. Teu: Can you refuse offer of an assignment by ARA if you wish to?

The Witness: Yes.

Q. (By Mr. Geisness): Do you by that refusal lose any points on the list? A. No, sir.

Q. If you work on an assignment or otherwise, is there any loss of points on the register?

A. You lose 30 points.

(Testimony of Horace W. Underwood.)

Mr. Darwin: You drop 30 places.

The Witness: You drop 30 places.

Q. Is that true of temporary assignment as well as permanent assignment? A. Yes. [241]

* * *

Cross-Examination

By Mr. Hull:

Q. Mr. Underwood, I believe you have testified that you were employed during the year 1949 on the vessel Coastal Rambler. Am I correct?

A. Yes, sir.

Q. And the Examiner has read into the record here certain records from your discharge book; is that right? A. Yes.

Q. And that discharge book is a book which a seaman keeps is it not, in which are recorded the times when he signs on and signs off articles on vessels. Am I correct in that?

A. Yes, that is correct.

Q. And the Examiner read with reference to the Coastal Rambler that you had signed on the Coastal Rambler 2 April, 1949, 4 May, 1949, and 1 June, 1949, and I will ask you now if those times refer to the times that you signed articles on the Coastal Rambler? Is that correct?

A. It must be if it is in that book there, because you never have that book signed unless it is for the articles.

Q. Yes. Now, that is fine. I believe the employment records of the company—and I want to

(Testimony of Horace W. Underwood.)

refresh your recollection [244] on this—show that you left the Coastal Rambler on August 6, 1949. Is that in accordance with your recollection?

A. I thought the book showed August 1st.

Q. That might be the time you signed off, but you remained aboard?

A. There may have been a port pay.

Q. Yes. But is it your recollection that August 6, 1949, is about the time you terminated on the Coastal Rambler?

A. I don't remember for sure, but it is possible that that is right.

Q. That is about the correct time, anywhere between the 1st and the 6th? A. Yes.

Q. Now, at the time you left the Coastal Rambler, Mr. Underwood, the vessel laid up, did it not?

A. I presume it did. They told me it was laid up.

Q. And the crew paid off the vessel?

A. That is right.

Q. During the period from 2 April, 1949, when you signed on the Coastal Rambler for the first time, and August 6, 1949, you were continuously employed on the Coastal Rambler, were you not?

A. That is correct.

Q. And the fact that your discharge book indicated that you signed articles on 2 April, 1949, and 4 May, 1949, and [245] 1 June, 1949, only meant that the vessel commenced new voyages at that time. Is that right? A. That is correct.

Q. But you were continuously employed from

(Testimony of Horace W. Underwood.)

the second of April to August 6th? A. Yes.

Q. And you were dispatched to that job on the Coastal Rambler by the ARA on April 2nd, were you not? A. By the ARA.

* * *

Q. (By Mr. Hull): This, Mr. Underwood, is what I want to make clear: You stayed with the vessel—you remained continuously employed on the Coastal Rambler from April 2 to August 6th, 1949. Is that right? A. Yes, sir.

Q. And that is generally true of radio officers. If they go on a ship, they remain in continuous employment, no matter how many voyages the ship makes—isn't that [246] correct?

A. You mean if the ship is in continuous operation?

Q. Yes. A. Yes, that is true.

Q. Yes, that is all I mean. That is generally true? A. Yes.

Trial Examiner Hunt: You mean to say the job the witness had on the Coastal Rambler was a permanent job until such time as the ship laid up?

Mr. Hull: Yes, and he testified, I believe, that the ship did lay up on August 6.

Trial Examiner Hunt: Is that correct?

The Witness: Yes.

Trial Examiner Hunt: It is a permanent job until it lays up?

The Witness: Until it lays up.

Q. After you terminated on the Coastal Rambler

(Testimony of Horace W. Underwood.)

—I am not clear as to your testimony on this, and I want to be sure—I am a little confused on it. You said you had a right under your applicable union rules, as I understand it, to stand by that ship. Is that correct? A. That is correct.

Q. But you, however, desired to draw unemployment compensation, is that correct?

A. That is correct. [247]

Q. And the unemployment compensation department told you that you could not stand by the ship and draw unemployment compensation—am I correct? A. That is correct.

Q. So you decided to draw unemployment compensation, is that correct? A. That is true.

Q. And by doing that you relinquished your rights to stand by the vessel?

A. I relinquished my union rights, you mean?

Q. Yes. A. Yes, that is correct.

Trial Examiner Hunt: I am sorry, but I have got to interrupt.

Is this period of standby one which would have been without compensation because the ship was laid up?

Mr. Hull: That is right.

Trial Examiner Hunt: Is that your understanding?

The Witness: That is my understanding, that I don't get any pay; I just hold my union right to the vessel.

Q. The company terminated operation of the

(Testimony of Horace W. Underwood.)

vessel on August 6th, and the vessel laid up, and the crew was paid off?

Trial Examiner Hunt: The vessel could have been laid up for repairs or any number of reasons. The witness then having the job could have been in the position of what we call [248] "standby"?

Mr. Hull: Yes.

Trial Examiner Hunt: That is on the ARA records it would have been his job whenever that ship sailed again?

Mr. Hull: Under his union rights.

Trial Examiner Hunt: Yes.

Mr. Hull: That is correct.

Trial Examiner Hunt: And in order to draw workmen's compensation——

Mr. Hull: Unemployment——

Trial Examiner Hunt: ——unemployment compensation, I mean, the witness had to give up the right to stand by?

Mr. Hull: That is correct.

Mr. Darwin: That is correct.

Trial Examiner Hunt: And that threw the job open to the man on the top of the list when the ship next sailed, is that what you are saying?

The Witness: Yes.

Q. And the effect of your drawing unemployment compensation, Mr. Underwood, was that you went back on the ARA assignment list for dispatch in normal course according to your relative position? A. Yes, although——

Q. That is all I want. Just the answer yes or no.

(Testimony of Horace W. Underwood.)

Now, with reference to the Palisana, I believe you [249] said you signed on September 11, 1949?

A. That is correct.

Q. And the Examiner read from your discharge book and also indicated that you had signed on again October 21, 1949?

A. That is correct.

Q. Now, you said about November 22 you were terminated on the Palisana?

A. That is about the date.

Q. Now, again, you were continuously employed on the Palisana from September 11 to November 22? A. That is correct.

Q. And the date October 21 simply means the vessel started on a new voyage on or about that date? A. Yes.

Q. And you signed new articles for that voyage, but as far as the company was concerned, you were continuously employed from September 11, 1949, to November 22, 1949? Is that right?

A. That is correct.

Q. And at that time the Palisana laid up?

A. No, she didn't move; she stayed at Pier 42.

Q. Well, she was inactive and the crew paid off?

A. Yes.

Q. And you were laid off with the rest of the crew at that time? [250] A. That is correct.

Q. And the company did not continue to pay you after that date? A. No.

Q. Now, when you said you took this job on

(Testimony of Horace W. Underwood.)

the Palisana, Mr. Underwood, you said it was a temporary job, am I right?

A. It is temporary provided Tommy Josserand came back.

Q. At the time it was tendered to you or at the time you took it, you knew it was a temporary job, am I right?

A. I knew it was temporary under certain rules of the Union, but we have had lots of discussion——

Q. But you knew it was offered as a temporary or a relief job?

A. I knew it would not necessarily have to be a temporary job.

Q. But it was offered to you as a relief job?

A. Not necessarily.

Q. Let me ask this, then: You also testified that the job on the Palisana was offered to everybody else in the ARA Hall before it was offered to you?

A. That is right. I would not accept it until they did offer it to everybody else.

Q. And nobody else would accept it because it was a relief job? [251] A. That is right.

Q. Then when you terminated on the Palisana, Mr. Underwood, you went back on the ARA assignment list in whatever your relative position was as of that date? Am I right?

A. Yes, that is right.

Q. I believe you testified, Mr. Underwood, this morning, that you had received what has been admitted in evidence as General Counsel's Exhibit 9

(Testimony of Horace W. Underwood.)

and General Counsel's Exhibit No. 10. Do you recall that? A. Yes.

Q. After that, did you go to the ARA hall and request to be dispatched?

A. Yes, the following Monday morning.

Q. And that you so advised the company that you had done that? A. Yes, I did.

Q. When did you say that was? The following Monday?

A. The following Monday after I received the mail, the letter on the 31st of March, 1950. It was the following Monday. [252]

* * *

Mr. Hull: Mr. Examiner, I would like to refer to General Counsel's Exhibit 1, and since it is not documented or identified, I think I will just ask to look through the file. I want to hand the witness, Mr. Examiner, a portion of General Counsel's Exhibit No. 1, and I guess I can best designate it by saying it is a charge filed against the Alaska Steamship Company dated 1/17/50, signed by Mr. Underwood, and I would like to state now I am calling the witness' attention to a typewritten addition or attachment [253] to that charge, and I will hand that to Mr. Underwood, and ask him about it.

Q. (By Mr. Hull): Did you prepare that typewritten statement? A. Yes, I did.

Q. Now, I want to ask you if you will refer to the third paragraph of the first page of that, where it will—where it says, "It is a fact that in my years

(Testimony of Horace W. Underwood.)

of individual efforts to be treated as a bona fide employee of this company"—what did you mean by that, Mr. Underwood?

A. Well, I mean that, and as the union knows, I have been on record for years—Mr. Lundquist can verify that fact, that I want to work for one company, just like the rest of the licensed officers, and I consider I am just as much an employee as the master and the mates, and the rest of the licensed officers. That is what I mean by that.

Q. So that you men, as I understand your testimony, that you only want to work for the Alaska Steamship Company?

A. Of course, since they have almost a monopoly on that run.

Q. You want to work in the Alaska trade?

A. That is right. I want to work in the Alaska trade.

Q. Only? A. Only.

Q. You would not accept a job on any other steamship run [254] offshore?

A. Not except under duress.

Q. I take it that you mean you would accept a job offshore?

A. Well, I want to eat, the same as you.

Q. It is not your desire to work for any steamship company other than the Alaska Steamship Company—correct? A. That is correct.

Q. And because you only want to work in the Alaska trade, Mr. Underwood, I take it that you

(Testimony of Horace W. Underwood.)

did not make any applications for employment to any other steamship company at all?

A. No, sir; I didn't.

* * *

Q. (By Mr. Hull): Now, referring again to that charge, [255] Mr. Underwood, and the last sentence in paragraph 3 of the first page, there, which reads as follows:

"I have lost considerable income and have been handicapped by being forced to wait on the beach until my name came up on the ARA closed-shop hiring list and a vacancy occurred in this company."

What do you mean by having to wait on the beach?

A. I mean by that I am competing with membership of the ARA only for a ship with the Alaska Steamship Company, which is a very small proportion of the total jobs available, while at the same time the entire membership of ARA compete with me for my small portion of the work.

Q. Because they will take jobs offshore and you won't?

A. They will take any job, and I take only the one on the Alaska run.

Q. Now, if you will refer to the second page of that charge, Mr. Underwood, I want to ask you concerning this statement, "I waited five months on the beach list of ARA for a job with the Alaska Steamship Company. On April 1, 1949, I was assigned by ARA to the MS Coastal Rambler of the

(Testimony of Horace W. Underwood.)

Alaska Steamship Company. This vessel was supposed to run for a normal season (six or seven months)."

Then you proceed to say that you applied for unemployment compensation, and then you say this:

"The rules of this organization prohibited me from [256] standing by a laid-up ship since I would not be actively seeking work."

Let me ask this: Do you mean the rules of the unemployment compensation commission were such that you could not hold your union rights to stand by the ship and still draw unemployment compensation? A. That is right.

Q. And by "this organization" you mean the Unemployment Compensation Department?

A. I mean the ARA.

Q. You said, "The rules of this organization prohibited me from standing by a laid-up ship, since I would not be actively seeking work."

By that you mean the Unemployment people——

A. Oh, yes; I did not understand. The unemployment rules would prohibit me from standing by the job because I would not be actively seeking work.

Q. I just wanted to clarify it.

Trial Examiner Hunt: By "standby" I understand he could not ship out on another ship before the departure of the ship he was standing by?

Mr. Darwin: That is right.

Trial Examiner Hunt: If he has a choice ship and he wants to stay with it, he gives up the op-

(Testimony of Horace W. Underwood.)

portunity for other employment in order to hold the good job? [257]

The Witness: That is right.

Mr. Darwin: That is why we have the rotational system of spreading the work.

Q. (By Mr. Hull): Now at the top—this is page 3 of that same document, Mr. Hunt—it says this—the first full paragraph on that page.

"On September 14, 1949, I accepted the job as relief operator on the Alaska Steamship Company MS Palisana."

Now, you knew at the time you accepted that job it was a relief job?

A. I cannot answer that yes or no, because there was a lot of union activity involved there.

Mr. Darwin: Now, Mr. Examiner——

Mr. Teu: He says he can't answer it yes or no, and he is entitled to answer the question in his own way.

Mr. Darwin: I am going to object, because there will be an awful lot of union activity, and I will object to any matter except matters involved in this hearing.

Trial Examiner Hunt: Do you have in mind the question he asked?

(Reporter reads question.)

Trial Examiner Hunt: Now, I am going to let you answer it in your own way, but I want you to confine whatever you say to that question. Don't ramble around. [258]

(Testimony of Horace W. Underwood.)

Mr. Hull: I think that can be answered yes or no. It seems to me it is susceptible of a categorical answer.

Trial Examiner Hunt: I don't know. He says it can't be, and I am going to take his judgment, but his answer will be subject to a motion to strike.

A. Technically it would be known as a relief job as far as ARA rules are concerned, but remember that I accepted this job only after it was offered to every other member in the hall and none of them would accept it. Then I took it, and the Seattle membership, a large majority of them, had intended for me to keep this job and buck Miller, the agent for ARA. I was to keep this job on the Palisana if Tommy Josserand did not get his license and could not come back to the job.

Trial Examiner Hunt: You started on the job as a relief job with some expectation, depending on what happened to someone else's license, that it might become more than a relief job?

(Witness nods affirmatively.)

Mr. Darwin: Now, I am going to ask in behalf of the respondent union to strike so much of the answer which begins with, "* * * the Seattle membership intended for me to keep this job * * *" and so on.

Mr. Teu: If this is within his knowledge, it is not subject to the motion. [259]

Mr. Darwin: I am addressing the Examiner.

Trial Examiner Hunt: Did you complete it, Mr. Darwin?

(Testimony of Horace W. Underwood.)

Mr. Darwin: Yes, I did.

Trial Examiner Hunt: I have some question about the probative value of the testimony as to the expectation of the membership of the union, but that statement is part and parcel of a statement I think he attributed to Miller. They intended to buck Miller, who was the agent at the time, and I will let the answer stand with my statement that I question the probative value of what he thinks the expectation of others was. I find it difficult to strike part of that answer. Let us have another question, Mr. Hull.

Q. (By Mr. Hull): I will ask you this, Mr. Underwood: I take it your position is that you feel that you are entitled to certain seniority rights with the Alaska Steamship Company, is that correct?

A. That is correct.

Q. And you feel because under the rotational hiring system you must compete for all jobs, that you are being discriminated against in some way. Is that your attitude in this case?

A. That is correct.

Mr. Hull: That is all the questions I have. [260]

Cross-Examination

By Mr. Darwin:

* * *

Q. Now, in answer to Mr. Hull's question, you said that when you took the job on the Palisana that it was not necessarily true that you were offered

(Testimony of Horace W. Underwood.)

that job as a relief job. Do you remember that testimony? A. Yes.

Q. Now, your assignment to the Palisana was on the 14th of September, 1949? That is correct, isn't it? A. It was about that date.

Q. I show you a photostatic copy of three official assignment slips, and ask you to look at the third one from the top.

A. (Witness does so): I have looked at it.

Q. All right. Is that your signature?

A. This is my signature.

Q. Now, that clearly indicates that the assignment to you was a relief trip? Isn't that right?

A. Technically, yes.

Q. When the assignment was made to you on the 14th of September, that was a relief job that you took—that is right, isn't it?

A. Technically, yes. [270]

Q. I also ask you if you would be good enough to look at the three assignment slips on that, and ask you if those bore your signature on the originals which you signed?

A. Yes, they are all my signatures.

Q. Now, I will ask you to look at the first one and tell me whether it is not a fact that when you were assigned to the MV Coastal Rambler from the active list that was a permanent job and it was so indicated, isn't that right?

A. That is right. [271]

* * *

(Testimony of Horace W. Underwood.)

Q. (By Mr. Darwin): Now, Mr. Underwood, you were sent these telegrams for job assignments since Mr. Lundquist has been port agent here, isn't that correct? A. I believe so. [273]

Mr. Darwin: Reading the first one, it is dated October 13, 1950, to Horace Underwood, Vashon, Washington. "MSTS for Military Sea Transport Service is an Alaska vessel. Radio officer assignment open. Call Mr. Walker, MAin 0100." Signed, Lundquist.

The next, "12/19/50," addressed in the same manner, and at the same place, "Four to five months assignment radio officer Alaskan waters available. Sailing Thursday. Government-owned vessel. Phone for details." Signed, Lundquist, ARA Port Agent.

The next, addressed the same way, 2/19/51, "Expect coastwise relief trip about 12 days available tomorrow, Wednesday. Advise if interested." Signed, Lundquist.

Q. (By Mr. Darwin): Now, in respect to the first telegram of October 13, 1950, isn't it a fact, Mr. Underwood, that you telephoned Mr. Lundquist and acknowledged the receipt of the latter telegram? A. I did.

Q. Isn't it a fact that you told him at that time that you would rather wait for an Alaska Steamship Company job? A. That is right.

Trial Examiner Hunt: What do the letters "MSTS" stand for?

Mr. Darwin: Military Sea Transport [276] Service.

(Testimony of Horace W. Underwood.)

Q. With respect to the December 19, 1950, telegram, you phoned Mr. Lundquist the next morning, did you not? A. I did.

Q. And you acknowledged receipt of the wire?

A. That is right.

Q. Mr. Lundquist gave you some details as to the kind of job that was? A. He did.

Q. Did he tell you it would be a job for about four months?

A. He said he thought it would be about four months or longer, that it was a government job.

Q. You said that you would not take it because it was that long, is that right?

A. That is the main reason.

Q. You also indicated that you would not take it because you were still wanting an Alaska Steamship Company job?

A. Let me clarify it. I said it would be four months. What I meant by that was not that it would be four months, but I could not return to Seattle for four months. I would not take it because I would not get back; I could not get back for four months. That was the reason.

Q. Yes. And I think you also indicated that you were still interested in an Alaska Steamship Company job? A. That is right.

Q. In a permanent job on an Alaska Steamship Company vessel? [277]

A. That is right.

Q. And in response to the last telegram, February 19, 1951, you advised Mr. Lundquist that you

(Testimony of Horace W. Underwood.)

had been requested to come to the impending hearing which was due to be heard on the 27th of February? A. That is right. [278]

* * *

Trial Examiner Hunt: All right. We have a number of letters produced by the union and allegedly from the witness; likewise by the [279] company.

* * *

Now, Mr. Darwin, will you state, if you please, the dates, the earliest and latest dates, of the letters from the witness to the union and the number of letters between the dates?

Mr. Darwin: All right. The earliest date is April 1, 1949, and the last date would be July 3, 1950.

Trial Examiner Hunt: How many letters within that period of about 15 months?

Mr. Darwin: Within that period there are six letters.

Trial Examiner Hunt: I will ask the parties if they will stipulate in lieu of receiving these letters in evidence that the witness said in one or more of the letters that he opposed the rotational system of assigning radio officers to jobs, and that he also said that he was interested in employment with the Alaska Steamship Company only, and that he opposed competing with all other radio officers for jobs with the Alaska Steamship Company; that the fact is that although not stated in any particular letter, that at all times material and, indeed, since

(Testimony of Horace W. Underwood.)

1946, the witness has been interested only in employment with the Alaska Steamship Company and has so stated to Mr. Lundquist and Mr. Lundquist's predecessors back to the year 1946. In addition, the witness stated in one or more letters that he was aware of the provision that for each week a radio officer worked on a relief job his name dropped 30 places on the assignment list; that [280] the witness also stated in one or more letters that he opposed the rule which limited standby to maximum periods of 90 days and specifically said that such rule was not a good one insofar as employment by Alaska Steamship Company was concerned.

Insofar as I have composed your stipulation, gentlemen, are you in agreement?

* * *

Mr. Teu: I see. The record does show the stipulation was based on the letters?

Trial Examiner Hunt: Yes.

Mr. Teu: I will so stipulate.

* * *

Trial Examiner Hunt: On the record.

For the purpose of clarity, there are two more points: When I use the words that the witness opposed competing with [281] all other radio officers for jobs with the Alaska Steamship Company, I should have said all other radio officers on the assignment lists or list for such jobs with Alaska Steamship Company.

Mr. Teu: I will stipulate that.

(Testimony of Horace W. Underwood.)

Trial Examiner Hunt: Now, Mr. Hull wanted to be doubly clear that he is stipulating only as to his understanding of the content of the letters from Mr. Underwood to the union, and definitely, we are not dealing now with the letters from Mr. Underwood to the respondent company.

Now, insofar as I have stated the stipulation, Mr. Darwin, are you in accord with it?

Mr. Darwin: So far.

Trial Examiner Hunt: Now, we come to the witness' statement in at least two letters, one of which was dated December 20, 1949—and I do not have the date of the later one—that he knew his job on the Palisana was a relief job, and if I can recall correctly, Mr. Darwin, you wanted to read into the record one paragraph of a later letter?

Mr. Darwin: That is the April 10, 1950, letter?

Trial Examiner Hunt: All right. Will you read it?

Mr. Darwin: When I quote, I am now quoting from Mr. Underwood's letter to the president of our union, dated April 10, 1950:

"When I took the relief job on the Palisana I said to [282] Ralph Miller and Clyde Bowen, 'Offer this job to everybody on the list. If none will accept it, I will protect Tommy Josserand and relieve him.' No one on the list was willing to sacrifice his position on the list to relieve Tommy.

"When I relieved him I unquestionably sacrificed all my chances on the list and gambled on whether the relief job on the Palisana may even-

(Testimony of Horace W. Underwood.)
tually become permanent or Tommy will come back and claim it." [283]

* * *

Mr. Hull: I have produced letters commencing March 9 through May 25, and I believe there is one other.

Mr. Teu: March 3, I believe, Mr. Hull.

* * *

Trial Examiner Hunt: On the record. I will ask the parties if they will stipulate that between March 3, 1950, [285] and May 25, 1950, the witness wrote to the company eleven letters in which the witness expressed in one or more of the letters (1) a continuing interest in obtaining employment by the company; (2) the witness' opposition to the rotational system of assignment of the radio officers; and, (3), the witness' thought about a system of hiring based upon seniority, which, in the witness' judgment, would have afforded him a better chance of employment by Alaska Steamship Company.

Mr. Teu: I so stipulate, Mr. Examiner.

* * *

Trial Examiner Hunt: On the record.

I understand that insofar as I have stated the proposed stipulation, Mr. Hull and Mr. Teu and Mr. Teu for Mr. Geisness are in agreement.

In addition, Mr. Hull just pointed out the letter from the witness to the company under date of December 20, 1949, in which the witness expressed his opposition to the rotational system of assignment

(Testimony of Horace W. Underwood.)

of radio officers, it being Mr. Hull's [286] position that as early as that date, namely, December, 1949, the company was aware of the witness' position.

Mr. Teu: I so agree. [287]

* * *

Trial Examiner Hunt: You will recall, Mr. Darwin, that we had some discussion about a stipulation concerning the essential contents of the letters from the witness to the company. I gave you an opportunity last evening to examine those letters.

Mr. Darwin: Yes.

Trial Examiner Hunt: Are you in accord with the stipulation?

* * *

Mr. Darwin: The question to me is, do I agree with this stipulation?

Trial Examiner Hunt: Yes.

Mr. Darwin: Yes, I do.

Trial Examiner Hunt: You are in accord with it?

Mr. Darwin: Yes. [291]

* * *

Cross-Examination
(Resumed.)

By Mr. Darwin:

Q. When did you accept the job with the Alaska cannery in 1950? A. July 23. [295]

* * *

Q. (By Mr. Darwin): What did you mean when you wrote, "I personally believe you may pos-

(Testimony of Horace W. Underwood.)

sibly have the solution to this hiring hall and discrimination problem in your present move."

What did you mean by discrimination?

A. I can tell you. If you operated——

Q. Take it slowly. I want to hear it, and the reporter [310] wants to get it.

A. If you operated a hiring hall that is non-discriminatory, and would come in and try to go on your list, he would have a number—he would be given a number the same as a regular member, and he would be allowed to climb to the top of that list. In other words, he would be treated just exactly like your members in every respect. That is a non-member, who had never worked for the company before, could come in and apply for a job as a radio officer.

Q. Of course if a man, being a non-union man, does not come in and make known his availability and give us his registration in writing, we would not begin to know he is available for work, would we? Just answer yes or no.

A. You mean you would not know? [311]

* * *

Q. (By Mr. Darwin): On May 7, 1950, you wrote a letter—and this, incidentally, is the very last I have concerning these letters—if that is any comfort or assurance—in this letter that you wrote to Mr. Zumdieck also you say, "You can plainly see that I will get nothing but discrimination from Miller or ARA. So I am asking you to put me to work, and I in return would withdraw the charges

(Testimony of Horace W. Underwood.)

against the Alaska Steamship Company and let them stand against ARA."

What did you mean by that?

A. I meant just that; I would withdraw charges against the Alaska Steam, because they would be complying with the law [313] to put me to work. I have to work. I have a family to support.

Q. In other words, Mr. Underwood, in all of these writings and these communications to the company, your position has always been that you would do anything which would put this union in an embarrassing position with the government, the Labor Board, with respect to the Act, even if it meant to cooperate with the company?

Mr. Teu: I object to that, Mr. Examiner.

Trial Examiner Hunt: He may answer.

A. No, I am not trying to harm the union. I am not trying to harm anybody. I am just trying to be able to make a living like all the rest of the licensed officers do, and live my life in a decent sort of way, and not be controlled by a roulette wheel.

Q. What do you mean by a roulette wheel?

A. By that—we have a man on the Baranof who has worked steady three years because that ship never laid up. I had a job on the Coastal Rambler, where I worked four months, and on a trick lay-off I am out of work.

Q. What do you mean by "trick lay-off"?

A. That is the only time it ever occurred in a case like that.

Q. That is an instance in which you guessed wrong as to whether you should stand by the Coastal

(Testimony of Horace W. Underwood.)

Rambler, or whether you should collect unemployment insurance? Is that right? [314]

A. That is not true.

Q. What is true?

A. I did not guess wrong. I decided to stand by, and I can produce witnesses to prove I did stand by, and no one knows how long this ship will stand by. The Ring Splice did the same thing. They thought she would be there a short time, and she stayed there a year.

If you apply for unemployment insurance, it takes a month to get a nickel, and I was just about broke; so I was between the devil and the deep blue sea. I had to apply for unemployment insurance or mortgage my place to live.

Q. Mr. Underwood, when you were on the Coastal Rambler as a permanent job holder, and it did—and it tied up, you at that time thought she would tie up for about three or four months, didn't you?

A. No, I did not, because I had read articles in the papers and clippings that my father-in-law sent me from Ketchikan, that there was lots of salmon in Southeastern Alaska, and I figured she would go out again.

Q. As a matter of fact, you said so in writing several times, and as a matter of fact, you also put that as the basis for your statement, or, as you call it, the brief to the National Labor Relations Board, didn't you, that you expected the vessel to tie up for about three or four months? [315]

(Testimony of Horace W. Underwood.)

A. I didn't put it that way. I said no one knows.

Q. You expected it to tie up for three or four months? A. No, I didn't expect it.

Q. How long did you expect the Coastal Rambler to tie up?

A. I figured she would go out in a little over 30 days at the time, because that would be when the fish would be in the cans up there. [316]

* * *

Q. (By Mr. Darwin): So that is what you meant by the roulette wheel operating against you, is that right? A. In a sense.

* * *

A. (Resuming): ——on the Palisana and these others, these other ships there, I say it is a roulette wheel because I completely—it started because I was trying to abide by a government rule that said I could not keep my job. That was in conflict with your union rule, and that started the [318] whole chain of things.

Q. Let me interrupt. By "in conflict" with our union rules, you mean they have existing shipping rules and customs in the Seattle port. Is that what you mean?

A. Not only the Seattle port, but all the ports.

Q. Well, particularly, we are concerned with the Seattle port?

A. If my financial condition was such, I would not have applied for unemployment insurance.

(Testimony of Horace W. Underwood.)

Mr. Darwin: Read that again.

(Reporter reads last answer.)

Trial Examiner Hunt: I have a note that I want to go into this matter of unemployment compensation, so that the record will be perfectly clear. I am not sure that it is. I don't want to interrupt you on cross-examination with a line of inquiry I will take up later. If you do want to go into that particular subject matter, that will be fine. I want to get it perfectly clear why he went on the active list at the time he was seeking to draw unemployment compensation.

Mr. Darwin: All right.

Q. (By Mr. Darwin): Why did you do that?

A. The reason for that is because by waiting you might miss by minutes or hours getting a job. Any delay such as a day in going on to that list might mean somebody else might [319] possibly be ahead of you. They might beat you out by one number on a job later on.

* * *

Questions by Trial Examiner Hunt

Q. (By Trial Examiner Hunt): The job on the Coastal Rambler which you had was a permanent job? A. Yes.

Mr. Darwin: When you have a permanent job, are you on the active list?

The Witness: You are on the employed list.

Q. (By Trial Examiner Hunt): That is right; you are not on the active list?

(Testimony of Horace W. Underwood.)

A. You are not on the active list.

Q. All right. When you have a relief job, you are on the active list?

A. The employed list.

Q. All right. For the time you are on the relief job, you are on the employed list, but when you finish on the relief job, you go back on the active list, dropping a particular number of points for each week you were on the relief job? Is that right?

A. That is the same as for a permanent job.

Q. Do you drop the same number of points when you go back on the active list for each week you have a permanent job? [320] A. Right.

Q. All right. You have a permanent job, and the ship lays up. If a ship is laid up for several months, you can stand by the job, by the ship, if you want to? A. Without pay.

Q. That is right; without pay. So that when the ship next goes out, you go out with it?

A. Yes, that is right.

Q. Now, during the months it is laid up, you will not be referred to a job from the active list?

A. That is right.

Q. You will have to get other employment if you want it, according to your resources?

A. That is right.

Q. When the Coastal Rambler tied up you were faced with the need of obtaining money?

A. That is right.

Q. The way to do it, as you saw it, was to get unemployment compensation? A. Yes.

(Testimony of Horace W. Underwood.)

Q. The unemployment compensation regulations would not permit you to draw that compensation so long as you were standing by?

A. That is right.

Q. Was that because under those regulations there was a [321] presumption that you were employed or not available for work?

A. You are not actively seeking a job. [322]

* * *

Trial Examiner Hunt: We will have to get the testimony from the witness, rather than comments from counsel, unless we have a stipulation.

I think I understand now why he had to give up standby on the Coastal Rambler. And I suppose the next step is when the Coastal Rambler did next ship out, the man who got the job as radio operator got it in the usual course of events from the top of the active list. Is that right?

The Witness: I am pretty sure he did.

Mr. Darwin: At which time you were at the bottom, or working your way up from the bottom of the list?

The Witness: I would not be at the bottom.

Mr. Darwin: If you were working your way up, you would not be at the bottom.

Trial Examiner Hunt: You would be going up the list?

Mr. Darwin: That is right.

The Witness: Yes.

Trial Examiner Hunt: Were you going up the

(Testimony of Horace W. Underwood.)

list any more slowly than a member of the union?

Mr. Darwin: At that time he was a member of the union.

Trial Examiner Hunt: I stand corrected. There is one [324] other point. I think the testimony of the witness is, and it is perhaps also shown by General Counsel's Exhibit 7, that some ships of the respondent company, such as the Baranof, are rarely laid up, and other ships are laid up much more frequently?

The Witness: The Baranof does not lay up. She runs steady.

Trial Examiner Hunt: She is in commission continually?

The Witness: Yes.

Trial Examiner Hunt: The man who goes off the top of the list and gets a job as radio operator on the Baranof has substantially a continual employment?

The Witness: Yes.

Trial Examiner Hunt: The man on the top of the list, if for any reason he expects a job on the Baranof to become vacant, could seek to obtain an assignment to that job by refusing other assignments in the meantime, thereby holding his place on the top of the active list, so that if his expectation that the Baranof would have a vacancy comes true, he is in a position to get it?

The Witness: Yes, that is right. [325]

* * *

(Testimony of Horace W. Underwood.)

Questions by Trial Examiner Hunt

Q. (By Trial Examiner Hunt): Does the first one of these assignment slips show, Mr. Underwood, that you went to the Coastal Rambler from the active list in a permanent capacity?

A. Yes, it does. He usually puts—here it says, "Temporary" and "Permanent." You see, the "X" I am speaking of?

Q. Yes. All right. The second shows that you went from the standby assignment on the Coastal Rambler to the active list?

A. Yes, that is right.

Q. The third, that you went from the active list to the Palisana in a relief capacity?

A. That is correct. [327]

* * *

Q. Now, the fourth photostatic copy shows that you went from the Palisana to the active list?

A. Yes.

Q. Is the active list the same as the active beach list? A. Yes, that is the same thing.

* * *

Cross-Examination
(Continued.)

By Mr. Darwin:

* * *

Trial Examiner Hunt: I will receive in evidence Respondent Union's Exhibit No. 5 for identification.

(Testimony of Horace W. Underwood.)

(Documents heretofore marked as Respondent Union's Exhibit No. 5 for identification, was received in evidence.)

Q. (By Mr. Darwin): Mr. Underwood, since the signing of the very last assignment slip shown on Respondent Union's Exhibit 5, December 1, 1949, have you ever signed another one of these assignment slips?

A. I signed one for the Pacificus, the job you offered at the last hearing.

Q. That is right. And that was on February 27,—— A. February 27.

Trial Examiner Hunt: So that the record may be clear—I am sorry to interrupt you—I am not sure that we do have anything in the record about it. But at the time [328] we were in session during February, when it became apparent that on motion by the two respondents we would recess for about a month, the witness was advised that his name had been reached for assignment, and I think one of the reasons we fixed the date for reconvening as of yesterday was to make sure he would be back from that assignment by yesterday.

You did take that assignment?

The Witness: Yes, I did.

Q. (By Mr. Darwin): And between December 1, 1949, and February 27, 1951, you did not sign any assignment slips?

A. I don't recall signing any assignment [329] slips.

(Testimony of Horace W. Underwood.)

* * *

(Document previously marked for identification as Respondent Union's Exhibit No. 6, was received in evidence.) [330]

* * *

Trial Examiner Hunt: On the record.

The parties stipulate that the union, whether by contract or not, does make referrals to employers other than those named in General Counsel's Exhibit 3 for identification.

* * *

The referrals just mentioned are by request of the employer or employers. That is the stipulation. Are you gentlemen in accord with it?

Mr. Teu: Yes, Mr. Examiner.

Mr. Geisness: Yes.

Mr. Darwin: Yes.

Mr. Hull: Yes; I am agreeable.

Q. (By Trial Examiner Hunt): Mr. Underwood, we had a stipulation yesterday that you had said on a number of occasions that you were interested particularly or only in employment by the Alaska Steamship Company? [333]

A. Yes.

Q. That does reflect your attitude?

A. You see, they have almost a monopoly on that run. I want to be on the Alaska run.

Q. And this company has a near monopoly?

A. I call it a monopoly since the Alaska Transportation Company went out of business.

(Testimony of Horace W. Underwood.)

Q. I believe it was your testimony in answer to a question by Mr. Darwin that under duress, as you call it, you took other jobs. You mean by the term "under duress" the necessity that you and your family eat? A. That is right.

Q. Was your effort to secure both a permanent and temporary job with the Alaska Company, or just a permanent job?

A. I wanted to get a permanent job because a temporary job puts you down on the list, and you would never have a permanent job as long as there is a beach list.

Q. (By Trial Examiner Hunt): Because you would be down on the list?

A. You would be down all the time.

Q. After you wrote this letter of resignation to the union, Union's Exhibit No. 6, was your treatment in the matter of referrals by the union any different than it would have been if you had remained a member, or than the treatment accorded members of the union? [334]

A. You see, after I wrote that letter, I did not go near the union until the Alaska Steam wrote me that letter and told me to go there and register.

* * *

Q. Now, you made an entry, you made your last entry in an official assignment in December, 1949?

A. Yes.

Q. That was about the time you testified you

(Testimony of Horace W. Underwood.)

started contacting the company and dealing directly with the company? A. Yes.

Q. And later on during December you wrote the letter of resignation?

A. Yes; you see my dues would expire on the 31st of December. [335]

* * *

Q. (By Mr. Teu): Mr. Underwood, the last and final assignment slip that you signed, and I refer to Union's Exhibit—I don't know what number it is——

Mr. Darwin: No. 5.

Q. ——was December 21—December 1, 1949; is that correct? A. Yes, sir.

Q. Shortly after that, December 29, 1949, you resigned from the union? A. Yes.

Q. As manifested by Union's Exhibit 7, I believe.

Now, when you received the letter from the Alaska Steamship Company requesting you to go to the ARA hiring hall and register, did you register?

A. Yes, I did. [343]

Q. Do you recall when that was?

A. I received the letter on March 31.

Q. What year?

A. 1950, and I went there the following Monday.

Q. When you are registered, is it necessary to again register before you are given an assignment to a ship? A. It should not be.

Q. Well, is it? A. It is not, no.

Q. In other words, one registration is a continuing one until you are assigned?

(Testimony of Horace W. Underwood.)

Mr. Darwin: Just a minute. I am going to object to——

Mr. Teu: Strike the question.

Q. (By Mr. Teu): Is the registration a continuing one until you are assigned?

* * *

A. Yes, it is.

Q. Now, how many assignments did you have during the year 1949? Just the number?

A. Two.

Q. How many did you have during 1950?

A. None. [344]

* * *

Trial Examiner Hunt: Oh, yes, he was testifying about his reasons for resigning from the union. I think the assumptions of his testimony were that the two assignments on the Palisana would drop him 30 places a week on the active list, so that by reason of having taken those two assignments on the Palisana—you, Mr. Underwood, dropped down so far on the active list that you would not have been reached for employment on the Alaska run until the spring of 1951 had it not been for the Korean war?

The Witness: Yes, because I would not have gotten to the top so that I could take an Alaska freighter in 1950. And there wouldn't be any more until 1951 unless somebody quit in the middle of the season.

Trial Examiner Hunt: Because they don't ordinarily run in the winter months?

(Testimony of Horace W. Underwood.)

The Witness: Yes, sir; in the winter they don't run. [361]

* * *

Trial Examiner Hunt: In this same connection the witness testified there was a change in the rules so that he did not have a permanent assignment on the Palisana. Does the record reflect the precise change in the rules?

* * *

The Witness: The only—the old bylaws used to permit a man who jeopardized his position on the list by taking a temporary assignment to keep that temporary assignment if it became [362] permanent.

* * *

Trial Examiner Hunt: Let's see if I get it. Back before the convention of 1949, which Mr. Darwin said took place in San Francisco in 1949, there was a regulation of the American Communications Association, the predecessor to American Radio Association, which regulation provided that a man who had a relief job could continue in that job on a permanent basis if the job became a permanent one during his tenure in it in a relief capacity?

The Witness: Yes, sir.

Trial Examiner Hunt: At that convention the regulations were changed, so that when the job which had at one time been a relief job became a permanent job, the assignment to it as a permanent job would be from the top of the active list?

The Witness: They would start at the top.

(Testimony of Horace W. Underwood.)

Trial Examiner Hunt: That is right; the man at the top might not want it; is that right?

The Witness: Yes.

Trial Examiner Hunt: They would go down until they found a man who did want it?

The Witness: Yes.

Trial Examiner Hunt: And the man who occupied the job in a temporary or relief capacity might not be reached [363] for it, because he would have dropped 30 places a week during the time he had it in a relief capacity. Is that the idea?

The Witness: That is right. [364]

* * *

(Document heretofore marked as Union's Exhibit No. 7 for identification, received in evidence.)

* * *

(Document above referred to marked as Union's Exhibit No. 8, for identification, and received in evidence.) [366]

* * *

(Documents referred to marked for identification as Union's Exhibits Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 and 19, for identification, and received in evidence.) [367]

* * *

(Documents referred to marked for identification as Union's Exhibits Nos. 20 to 25, inclusive, and received in evidence.) [368]

* * *

(Document referred to marked Union's Exhibit 26 for identification, and received in evidence.) [371]

* * *

Trial Examiner Hunt: We will mark that No. 27.

(Document referred to marked Union's Exhibit No. 27 for identification and received in evidence.) [372]

* * *

Trial Examiner Hunt: The hearing will come to order. [376]

The parties stipulate that on April 12, 1950, the respondent company wrote to the respondent union at its Seattle office enclosing a letter of April 3, 1950, to the respondent company from Underwood, in which, according to the April 12, 1950, letter, Underwood had expressed the opinion that the union would discriminate against him.

The letter of April 12 concluded with the expression that the respondent company trusted that there would be no discrimination against Underwood or Hughes.

The parties further stipulate that on April 19 there was a response by Ralph Miller, the port agent, to the company's letter, in which Miller stated that Underwood and Hughes had been listed for employment, and that there would be no discrimination against them. [377]

* * *

Trial Examiner Hunt: The assignment list that is dated 12-31-49 in the upper right-hand corner

will be marked Union's Exhibit 28, and the assignment list dated 3-10-51 will be marked Union Exhibit 29 for identification.

(Documents referred to marked for identification as Union's Exhibits Nos. 28 and 29, respectively, and received in evidence.) [379]

* * *

CARL W. LUNDQUIST

a witness called by and on behalf of respondent union, having been first duly sworn, was examined and testified as follows: [381]

* * *

Direct Examination

By Mr. Darwin:

Q. Mr. Lundquist, you have seen the letter of resignation of Mr. Underwood?

A. Yes, I have.

Q. When did you get into this port as port agent?

A. I arrived here on the 13th of September, and took over the office.

Q. What happened that morning with respect to some mail that you received from the Labor Board?

A. There was in one of the daily mails—I think it was the second mail—a registered letter which I signed for inasmuch as Mr. Miller was out of the office, although it was addressed to him as Port Agent.

I opened it and saw it was—I think it is called a complaint or charge, filed with the N.L.R.B. by Mr. Underwood.

(Testimony of Carl W. Lundquist.)

Q. Did you do anything with respect to that?

A. Yes, I did. I checked with Mr. Miller as to what it was all about as soon as Mr. Miller returned to the office.

Q. Then what did you do, and Mr. Miller do?

A. Well, what we did actually—he outlined to me his transactions, shall we say, with Mr. Underwood, and his understanding of the charges and the background for the charges, so as to acquaint me with it. [382]

Then I immediately notified the national office I had received charges by mail.

Q. Did Miller say anything to you with respect to Underwood's resignation and the effect that it had upon his relationship to the union?

A. Yes, he did.

Q. What did he say?

A. That was when I first saw the resignation. Miller pointed it out to me in the file, and he said that this had been received—I believe it was on the 30th, the day following mailing, and that it had been referred to a port or a branch membership meeting, the next branch membership meeting, and the resignation had been accepted and since then Underwood was no longer a member of the [383] union.

* * *

Q. (By Mr. Darwin): What action did Miller tell you had been taken pursuant to Underwood's resignation?

(Testimony of Carl W. Lundquist.)

A. I am trying to remember it exactly as he told me. First of all, the letter was received and noted, and was called to the attention of the following week's membership meeting by Miller, who was port agent, and he called a meeting——

Q. I don't wish to interrupt you. You have given that. There was action taken by the membership? A. That is true.

Q. What I was asking you about, what did Miller tell you with respect to the relationship of Underwood to the union? [385]

A. I was getting to that. I thought you wanted a complete answer on it.

Upon acceptance of the application, or, the resignation, rather, it became Miller's understanding, so he told me, that upon Underwood's own request, as indicated by the letter, and upon acceptance of that request through action of the membership meeting, Mr. Underwood was no longer a member of the union; he had no contact with the union; he did not wish to ship through the union; and he would not be called to the hall or had not been called for some time for jobs.

Q. Now, Mr. Lundquist, you have been with this union a long time, haven't you?

A. Yes, I have.

Q. You have been with it through the days of ARTA, the American Radio Telegraphers Association, back in 1932, through the ACA, and one or two other organizations, down to presently as port agent for the ARA—is that correct?

(Testimony of Carl W. Lundquist.)

A. I joined the original organization in March, 1933.

Q. You held office with this union, both in the ACA and, of course, the ARA?

A. That is true.

Q. You were secretary-treasurer for the ARA?

A. That is true.

Q. For how long a time? [386]

A. From the date of issuance of the charter on May 20, 1948, until the election of the new officers at the San Francisco early in February, 1949. I believe it was February 6th or 7th.

Q. And you maintained close contact and touch with the union, its affairs, and its national main office in New York?

A. I remained a functionary, you might say, until the first of May, 1949, and since then I have kept in close contact with the national office in New York, and the New York port office, the New York branch. [387]

* * *

Q. (By Mr. Darwin): Now, Mr. Lundquist, we had shipping rules prior to the writing up of the June 17, 1950, agreement between AMMI and the union in this case.

A. There were union shipping rules before that time.

Q. Those shipping rules were changed, were they not? A. They were changed.

Q. It is a fact, is it, that the effective date of those rules was June 20, 1950, when they were first

(Testimony of Carl W. Lundquist.)

ratified by the New York branch, and June 27, 1950, when they were finally ratified by the New Orleans branch? [391]

A. That is my understanding of it. Those are the dates, I believe.

Q. And, incidentally, the Seattle branch ratified the new shipping rules on June 21, 1950?

A. June 21, 1950, was the meeting date.

Q. So that, is it correct to say that when the July 14, 1950, agreement was signed between PMA and ARA, those were the shipping rules that automatically went into effect for the Port of Seattle?

A. Yes, those were the national shipping rules, and I assume when the contract was effectuated they became applicable in the Port of Seattle.

Q. Now, Mr. Lundquist, I show you what is now in evidence as union's Exhibit 28, and ask you with respect to the workings of the national list and the Seattle branch only, exactly what that exhibit shows. [392]

* * *

A. The list shows with regard to the Seattle branch—it shows the order in which men are listed in both the active and the inactive columns on the list, and that order in turn determines the order in which the men shall be called for assignment during the time this list is in effect, that is, for the following week.

I might point out, just to clarify something that may be confusing, that this list is dated for the week ending December 31, 1949. That means it was

(Testimony of Carl W. Lundquist.)

compiled at the close of business December 31, 1949, which would be a Saturday. It is always compiled as of Saturday. It is the week, or it is the list, rather, the official assignment list for the following week.

In other words, it goes into effect on January 2, although it may not be received out here until January 3, possibly. It further shows the sequence of names of radio operators listed as wishing to ship from Seattle. It shows the assignments made from the Port of Seattle for the week. It shows what is called the intra-list movements.

Q. What is an intra-list movement?

A. The intra-list movements comprise men changing port of availability. [393]

For instance, a man may have been on the Seattle list, and decide he will go to San Francisco. That is indicated the following week. He is not indicated as available in Seattle. It also indicates the men registering on the list from a ship or from another port. It indicates a man moving from the inactive column to the active column. I can't think of any other categories that the intra-list takes care of.

In other words, it lists all assignments of clearances issued other than those assignments to a job.

Then there is a fourth category, and that lists the men on standby for ships in the Seattle area—that is with respect to those men listed on the standby for ships in the Seattle area.

(Testimony of Carl W. Lundquist.)

That is the function of the lists, the purpose of the lists.

Q. Now, when you say it lists men for standby on the Seattle list, you mean by that that by looking at it you can determine the standby operators for Seattle ships as well as your ability to determine from this list standby for other branches as well?

A. That is correct.

Q. Is it true that Mr. Miller, your predecessor as port agent, and others simply worked from that list, which is Union Exhibit No. 28, to determine the status of men in this— [394] men on this Seattle port list, and did not make up a separate list as you do now? Is that correct?

A. I cannot say for all my predecessors. I do know that was Mr. Miller's practice, and I am quite sure it was the practice of both Mr. Sides and Mr. Travis, who in turn preceded Mr. Miller.

Trial Examiner Hunt: When did you succeed Miller?

The Witness: September 13.

Trial Examiner Hunt: September 13 of what year?

The Witness: 1950.

Trial Examiner Hunt: Then Miller and his predecessors, insofar as you know, made up the port list from the national list?

The Witness: Made up the port list?

Trial Examiner Hunt: Yes.

The Witness: No, they worked from the national

(Testimony of Carl W. Lundquist.)

list itself. If you will examine it, if you look at it, you will see notations——

Trial Examiner Hunt: All right. I stand corrected.

In other words, they did not make a port list; they went down this list with respect to individuals who indicated they wanted to ship out of Seattle?

The Witness: Yes, they thought that practice was satisfactory for the amount of shipping involved at that time. [395]

* * *

Trial Examiner Hunt: Did the national list contain the list of non-members during the period before the witness came here?

The Witness: Before I came here?

Trial Examiner Hunt: Yes.

The Witness: Some time before I came here, yes.

Trial Examiner Hunt: It contained the names of non-members?

The Witness: It would have—let me say it this way: It would have, if there were any registered. I don't know whether there were any registered before I came here. [396]

* * *

Q. (By Mr. Darwin): Will you explain, if you know, the incidence of assignments and shipping opportunities for radio operators in all ports, in all ports prior to about July 1, 1950?

A. In view of the fact that shipping was—I

(Testimony of Carl W. Lundquist.)

can't think of an adjective that is distressing enough to describe it—there were men on the beach, unemployed, here in Seattle and in New York and other ports for periods as long as five to eight months without being able to get an assignment because the shipping conditions at that time or for a long time up to—what date did you say approximately?

Q. July 1, 1950.

A. Yes, and for several years, ever since the slump in shipping which followed the cessation of hostilities—there was an oversupply of radio operators of—sometimes it reached a ratio of three to one for jobs available.

Q. When you say "cessation of hostilities," you mean the end of World War II?

A. The end of hostilities of World War II.

Q. Now, will you explain to the Trial Examiner the significance and the methods of operation of our employment offices in each of the branches?

A. I don't know whether I quite understand your question. You mean the actual physical procedure of making an assignment slip and so [397] forth?

Q. We operate as an employment office, do we not, in each of the branches? A. Yes.

Q. And is it the custom of companies under contract with us and companies not under contract with us and any of the military services who need radio operators to call upon us for assignment of radio operators?

A. I think I see the intent of your question, or the information you want. Acting as an employment

(Testimony of Carl W. Lundquist.)

office, we do receive calls for radio officers, almost always by telephone, although occasionally by letter, if there is time enough and if the company wants to be formal enough about it, advising us that on such and such a date they will require the services of a radio officer for such and such a vessel. It may or may not be a vessel under contract with the union. That is, for instance, in the Port of Seattle there are a lot of companies shipping,—well, they call themselves steamship brokers or steamship agents, who do not of themselves operate ships but are agents for perhaps half a dozen companies which do operate ships. I can name one, the International Shipping Company, here in Seattle. They don't operate ships for their own account. They do, however, act as agents for I don't know how many companies. We receive calls from them for radio officers required for vessels operated under contract to us, and also occasionally—quite frequently, in fact, for radio [398] officers on vessels operated by companies not under contract with us.

We recruit for the military authorities or any other agencies which require radio operators. The most frequent employer in the Seattle area would be the Military Sea Transport Service, and Mr. Walker—I don't know his title but he has at least to do with assigning of radio officers to ships owned and operated by the MSTS. Very frequently he calls and asks us if we have men available. He does not always indicate what ships he wants the

(Testimony of Carl W. Lundquist.)

men for. He says, "I have eight or ten openings." Or, "I have an opening on a troop ship. Do you have anybody available?"

We have also had inquiries from the Coast and Geodetic Survey and from the United States Fish and Wildlife Service. I can't think of any other agencies.

Q. In addition to that, of course, we service 32 member companies approximately, in addition to the Alaska Steamship Company here in this area, do we not?

A. Under the West Coast contract?

Q. Yes.

A. Yes, and all ships of companies on the East Coast under contract. [399]

* * *

Q. Now, what is the means of the Seattle branch's knowing whether a particular man is available with respect to an application that might be required of him? Can you tell us that?

A. I don't know whether I quite get your question. One who has already filed an application?

Q. No, I am asking you at any particular time how do you know a man is available?

A. Oh, I know a man is available by means of the Seattle port beach list.

Q. We will get to the makeup of that in a few minutes. But before I do, I want to find out from you, is it a fact that any man, be he union or non-union, is required to come in and register on a slip that we have?

(Testimony of Carl W. Lundquist.)

A. That is correct. That information is compiled on the port beach list. That is why I referred to the port beach list. I don't look at the man's individual registration for employment, but the port beach list is made up on the basis [400] of registrations for employment which are filed either here in Seattle, or in other ports indicating that the man wants to ship from the Port of Seattle.

Q. And that indication as to which port a man wants to ship from, referring you again to Union Exhibit 28, is indicated by the alphabetical legends immediately after his name? Beginning with the first one, that would be what?

A. New Orleans or No. Because of the fact that the greater portion of the men ship from New York, and the list is made up in New York, where a man's name is not qualified by any indication, the individual—the indication is that he wants to ship from New York.

Q. On Union Exhibit 28 there is a number in the first column. Do you notice that?

A. Yes.

Q. What is that first number?

A. That is what is called the master list number.

Q. Will you run down the line on Union Exhibit 28 and show us as to which man would be assigned number one on the Seattle port list?

A. On this port list?

Q. That is right.

A. On this particular day?

Q. Yes.

(Testimony of Carl W. Lundquist.)

A. The first one I see indicated is A. Skold.

Q. The number is what on the list? [401]

A. 222.

Q. And in the margin there is an ink mark number one right next to that number. Is that the indication of that man's status on the Seattle port list? A. That is correct.

Q. Who put that mark on there, do you know?

A. Ralph Miller.

Q. And it is a fact that the number 222, the national port number, corresponding to the number one, as the Seattle port number, is coincident with the abbreviation, "SEA," meaning Seattle following Skold as the first on the Seattle branch list for that week? Isn't that right?

A. That is correct.

Q. And so, similarly, if one wants to find the component makeup of the port list in Seattle, he would have to go down the line from Mr. Skold's name to the end, and he would then be able to determine, first, the names of operators who want to ship from Seattle, and their respective relevant numerical order, is that right?

A. That is correct. [402]

* * *

Q. (By Mr. Darwin): I am grateful for the Examiner's picking up the point, which brings us to the need for you to define specifically what is meant by active, inactive, and employed, as we find them on the national list.

(Testimony of Carl W. Lundquist.)

Will you be good enough to tell us that?

A. Yes. The shipping rules define those three categories, and they are listed accordingly. Active means unemployed and actively seeking employment. Inactive means unemployed or possibly working ashore on some job not calling for the use of his radio operator's license. A radio officer [403] can register on the inactive list. For instance, he may not want to ship for a period of six months. He may be going to school. He may be starting a business or making some investments. Or he may be following the horses. Whatever he is doing makes no difference, but he does not want to be bothered by calls for jobs. His name continues to move up the list in the same ratio as the men on the active list, but he is not called for a job until he indicates he has become active. That takes a period of one week.

In other words, a man cannot come in today in accordance with out shipping rules and say, "I want to go active and be called." He has to wait one week. The reason for that is to prevent collusion between operators when a good job comes in. A man might be riding the inactive list for months, and maybe a friend of his will telephone him that he is getting off a choice job, so he should move over on the active list. Maybe the job is coming up tomorrow. That would not be fair to the others seeking employment. The employed column consists of those men who are working on their license, as the expression goes. They are afloat or ashore, con-

(Testimony of Carl W. Lundquist.)

tract or non-contract, MSTS or government job, or whatever job it may be which requires use of a radio operator's license.

Now, with regard to the active list, or with regard to the inactive list, we will say—— [404]

Q. Before you get to that, is that the employed column which drops a man 30 numbers each week he is employed?

A. If he remains employed, on the next list his name appears 30 numbers lower than it did that week.

Q. And about the time Mr. Underwood left the Palisana, how long would it have taken a man normally to drop off the list as an employed member?

A. That would depend on what number on the list he was when he shipped out. A man might ship out with number 500——

Q. Assuming he shipped out from number one, how long would it take?

A. Number one, at the rate of 30 numbers per week—I don't know how good my arithmetic is, but there were approximately 900 names on the list at that time. That would be 30 weeks. [405]

* * *

Q. Incidentally, you had had a telephone conversation, as I recall it—not you, but Mr. Miller in your presence, had telephoned Mr. Underwood's home on the morning of September 13 to find out his whereabouts, after you, as you stated, saw that charge from the Labor Board, and your discussion with Mr. Miller? A. Yes.

(Testimony of Carl W. Lundquist.)

Q. What response did you receive, or Mr. Miller receive?

* * *

A. Mr. Miller stated that Underwood's daughter advised that [409] Underwood was still in Alaska, and was expected home in about two weeks. He was in a cannery, I should add.

* * *

Q. (By Mr. Darwin): What did Underwood tell you at that time?

Trial Examiner Hunt: This was on October 9th that he phoned you?

Mr. Teu: You were questioning about the call on the morning of September 13.

Mr. Darwin: We moved away from September 13. We are now at October 9.

Mr. Teu: I wanted to be certain where we are.

A. Mr. Underwood started off his conversation merely by the statement, "Hello, Carl. I am back." I was rather surprised because I did not think I knew him and he did not know me well enough to call me Carl in such a cheerful voice. Then there was some subsequent conversation. I don't remember the exact words, but I received the impression from it that Mr. Underwood wanted to be considered available for permanent assignments to vessels of the Alaska Steamship Company on the short runs only. By short runs, I assume of not more than three weeks' duration. [410]

* * *

Trial Examiner Hunt: All right. The witness

(Testimony of Carl W. Lundquist.)

got the impression from Underwood's remarks, which the witness cannot recall in detail, that Underwood wanted a short run with the respondent company.

The Witness: In the Alaska trade only.

Trial Examiner Hunt: All right. Now, what is a short run?

The Witness: A short run would be not more than three weeks' duration.

Q. (By Mr. Darwin): Now, had Mr. Underwood registered at all to your knowledge prior to October 7 and prior to the assignment slip of December 1, 1949, which is indicated on Respondent Union's Exhibit 5?

A. Prior to December 1, 1949?

Q. No, prior to October 7, 1950, and subsequent to the December 1st registration, being Respondent Union's Exhibit 5?

A. No, I had seen no evidence he had registered between [411] those dates.

Q. You asked Mr. Miller about it?

A. Yes, I asked Mr. Miller if he was on the list or where he was, and Miller's answer was he was in Alaska, and he had been so advised some time during the summer when he called Underwood's home over the phone to offer him an assignment, and he was advised by Underwood's daughter that Mr. Underwood had gone to Alaska.

* * *

Q. (By Mr. Darwin): Now, having had this

(Testimony of Carl W. Lundquist.)

conversation with Mr. Underwood on October 9—— [412]

A. That was the phone call.

Q. Yes. You reflected that, did you, on the Seattle beach list?

A. Yes, I did. I noted or made the entry that Underwood had called and indicated he was available.

Q. That is the entry on the list? A. Yes.

* * *

Q. (By Mr. Darwin): Now, what is the next time you heard from Mr. Underwood?

A. Early in December he telephoned me again, on December 9.

Q. And what did he tell you at that time?

A. He then advised he was available for a permanent or a temporary assignment to Alaska Steamship Company vessels to Alaska.

Q. Now, Mr. Underwood was maintained on the Seattle beach list from the list of October 7, which is Exhibit 7, week by week by that?

A. He was carried over from list to list as they were typed, yes.

Q. And when he telephoned you on December 5, I think you said, to tell you he was then available for a permanent or a temporary assignment to the Alaska Steamship Company [413] vessels, did you make a notation of that on the assignment list?

A. Yes, I corrected the list to show his statement that he was available for permanent or temporary assignment.

(Testimony of Carl W. Lundquist.)

Q. And that is reflected on Union's Exhibit 8, is that correct? A. Yes.

Q. Now, I show you what are in evidence as Union's Exhibits No. 9, 9 to 19 inclusive, and ask you whether they are the Seattle branch lists from January 6, 1951—January 6, 1951, down to and including March 17, 1951, which is the last and current list?

* * *

A. Yes, that is correct.

Q. Now, would you be good enough to look at those exhibits and tell us and explain to us the numbers in the first column, the significance of those numbers, and the next two columns. I think one is marked "ready" and the next is "not ready." And then some comments in the last column without a heading.

Will you tell us what those mean?

A. Do you want to refer to any particular list?

Q. Take the first one, Union's Exhibit 9, and I think your explanation would be typical for all, would it not? [414]

A. I think it would, yes, except for the fact it does not show the assignment of any non-union members, which is indicated in some lists.

However, your reference was to the numbers and the two columns——

Q. That is right.

A. Well, the numbers, of course, are—they are in numerical order, two columns of them, beginning with number one and beginning with number 238.

(Testimony of Carl W. Lundquist.)

Those reflect the order of the men's names, the first column is the Seattle beach list and the second is the master list. The third and fourth columns both show the names of the men involved, and they are broken down into "ready" and "not ready."

"Ready" would indicate those men who I know I can call for just about any job at the moment, that is, at any time during the week.

"Not ready" indicates that they don't want to be called until they advise me. It may be a matter of three or four days, or it may be a matter of a couple of weeks. A man may be temporarily sick. He may have undertaken some enterprise he wants to finish.

Q. You notice on Union's Exhibit 9 the first name is N. Coll, and that is crossed out physically by an ink mark? A. Correct. [415]

Q. Then there is a notation, "Transferred to New York, active 1-8."

What does that mean?

A. That means on January 8 he came in in person and advised me he was going to ship from New York and he requested a clearance slip to that effect, and I issued it.

Q. All right.

A. And that made him available no longer in the Port of Seattle. Therefore there was a line drawn through his name.

Q. The next name with a line drawn through it is R. Frye, with the notation in the last column, "Assigned SS Mormacmoon 1-10-51."

(Testimony of Carl W. Lundquist.)

What does that mean?

A. That means that on January 10, 1951, he accepted an assignment as radio officer on the SS Mormacmoon. Obviously, he became employed, and no longer unemployed and available for employment.

Q. And similarly, without going into details, there are references in the last column with respect to names that are crossed out and others with no crosses through the names, which indicate some disposition for that week as to some of those names?

A. Correct.

Q. Now, you notice at the bottom of the page, you have listed five names? [416] A. Yes.

Q. At the head of which is "H. Underwood"?

A. That is correct.

Q. And you have the legend, "non-member perm. or temp. to Alaska." What does that mean?

A. That means Underwood is not a member of the union, and that he is interested in only a permanent or temporary assignment to Alaska.

Q. Then you have Dallas Hughes, V. M. Cotter, and two other names, Caldwell and Mather?

A. Yes.

Q. Does that mean there that that was their respective standings on the list as of that time?

A. That is correct.

Trial Examiner Hunt: What do the initials "PCM" stand for?

The Witness: Permit card members. They are just applying for membership in the union.

(Testimony of Carl W. Lundquist.)

Q. (By Mr. Darwin): What is the practice under our shipping rules either with respect to a member of the union or a non-member who wants to ship out of a particular branch insofar as the requirements for him to fill out an application blank is concerned?

A. Which application blank are you referring to? For membership? [417]

Q. No, I am referring to the employment application.

A. That is governed by the shipping rules which specify that any unemployed radio officer who wishes to obtain employment through the facilities of the union must so indicate by filling out the proper form.

Q. Has Mr. Underwood at any time come in to you and filled out any application to ship out?

A. He has not.

Q. With the exception, of course, of the hearing we held there last month, where his number came up in the regular course, and you assigned him to a job?

A. That was not an application to ship out; that was an assignment to a job—two different things.

Q. Oh, I see. So that, in effect, even today Mr. Underwood has not complied with the rules which you impose upon members and non-members alike with respect to applications to the union to be assigned to a vessel, is that right?

A. Not to my knowledge.

Q. Your answer "not to my knowledge:" means

(Testimony of Carl W. Lundquist.)

that he has not come in to fill out such a blank that you require indiscriminately of members and non-members?

A. He has not come in to me to fill out such a blank, or to anyone else, and there is no record of his having done so anywhere else.

Q. That you know of? [418]

A. That I know of, clearly, because if he had done so, his name would appear on the national assignment list.

Q. What is the practice with respect to a non-union man who comes in and does fill out an application for a job insofar as the transfer of such application to the national office is concerned?

A. It is transferred to the national office just the same as an application of a union member.

Q. Now, I hand you Union Exhibit 11, and you will notice that you have similar crossings with respect to men in the upper portion of the list, and then you have a list headed by "H. Underwood," with the names of Cotter and Mather crossed out?

A. That is correct.

Q. What does that signify?

A. That signifies that those men were assigned on the particular dates indicated following their names to vessels—Cotter to the SS Newcastle Victory on January 27, 1951, and Mather to the SS Green Star January 24, 1951.

Q. Now, why was it, why wasn't Underwood assigned to either one of those vessels although he is ahead of either Cotter or Mather?

(Testimony of Carl W. Lundquist.)

A. First of all, neither of those vessels was operated by Alaska Steamship Company, and, secondly, they were not in [419] the Alaska trade, and thirdly, they were not going on short voyages.

Q. And those were the specifications and limits which Mr. Underwood to you had imposed as a condition to your assigning him to any job, is that right? A. That is correct.

Q. Now, you recall, and the Trial Examiner made a statement in that connection earlier today, that at the last hearing on February 27 held here, Mr. Underwood was sent out on a job. Do you recall that? A. Yes.

Q. What job was that?

A. The Steamer Pacificus.

Q. And will you describe the circumstances under which he was assigned to that job? What I am asking is, did his number come up? Was that his regular turn for assignment?

A. It was his turn for assignment, yes.

Q. Previously to that had he indicated to you that he was ready for any job, temporary or permanent, on any vessel? A. No, he had not.

Q. And that was the first time that he had accepted a job other than one in the Alaska trade with the Alaska Steamship Company as a permanent job?

A. I will have to correct myself. He had indicated a short while before that that he would accept a temporary [420] assignment to the SS China Mail, but was unable to do so.

(Testimony of Carl W. Lundquist.)

Q. Why?

A. Because, as he advised me, he had been subpoenaed to appear before this hearing.

Q. Now, finally, before I leave the subject, I show you Union's Exhibit 16 with H. Underwood's name with a red line through it, and tell us whether that indicates that he had been assigned to the SS Pacificus some time during the week of the 17th of February, when the list was made up?

A. Not the 17th of February, no. The list is the one for the week ending February 22.

Q. That is right.

A. And the assignment was made on February 27, of Mr. Underwood to the SS Pacificus in Seattle.

Q. Now, look at Union's Exhibits 17, 18 and 19. Underwood's name does not appear any more, does it? A. It does not.

Q. And what is the significance of that?

A. Presumably that he is employed.

Q. You mean presumably, since you knew he had been sent out to the SS Pacificus and he had not reported in to you that he was again available for another job?

A. He had not subsequently registered for employment.

Q. Now, assume Mr. Underwood's job ended tomorrow, would it be necessary for him to come in and register for employment [421] before you could send him out for another job?

A. In accordance with the rules, it would be.

(Testimony of Carl W. Lundquist.)

Q. Then what would be done with the registration slip? Would it be sent East?

A. It would be sent to the national office for compilation in the following assignment list, the same as all others.

Q. Meaning union and non-union members alike?

A. Correct.

Q. Now, Mr. Lundquist, I show you what is now in evidence as Union's Exhibits 20 to 25, respectively, and taking Exhibit 20, will you tell us what that indicates?

A. Exhibit 20 is a report on a form used by the union called a job report sheet. These job report sheets are used in all the ports to indicate the request for a radio officer for a ship, and the particulars pertaining thereto, such as name of the ship, the company operating the ship, the date the job begins, where the man is to report, where the ship is located, date of arrival, date of sailing, possible destination, and then at the bottom there are several spaces, several lines left for any other notations that may be required, and finally a space in which is to be indicated the name of the radio officer assigned, the date and his union status.

At the top there are also some provisions for indicating who reported the job and the date on which it was reported and also who was the [422] dispatcher, and the category of the job.

Q. Now, will you take, for instance, Exhibit No. 20 and tell us what "reported by"—"Meland reports ill."

(Testimony of Carl W. Lundquist.)

A. That indicates, the two lines together, "reported by" and "date" means that on December 22, at 8:45 a.m. Paul Meland reported he was ill and he would be unable to make the voyage on the Coastal Monarch, and he requested I try to arrange for a relief operator for him.

On that basis I typed in at the line for the ship, "Coastal Monarch (relief)" to indicate it was not a permanent assignment.

Q. Now, I notice the probable sailing date in the right-hand column near the bottom is marked "Friday." What is the significance of that?

A. Well, he apparently indicated to me that he expected the ship to sail on Friday, or it may—there is a possibility of conflict. I don't think it is too important. It may be the information may have come from the steamship company. I cannot in accordance with the contract take a radio officer's word for it that it is agreeable to the company that he take a trip off. It must be mutual between the company and the operator.

Q. Was there any occasion——

A. I was going to say, therefore I have to check with the company as to whether it is permissible with them for [423] Mr. Meland to arrange for a trip off. It could be the company informed me the ship was to sail Friday.

Q. Now, was there any occasion for haste in filling this job?

A. To the extent the ship was signing on that morning. The instructions were that the man was

(Testimony of Carl W. Lundquist.)

to be aboard the ship at Pier 42 to sign on that morning.

Q. At 9:15 a.m.?

A. No, they usually sign on at ten. 9:15 is when they contacted the company.

Q. And this job was to be filled in three-quarters of an hour? A. Signing on time was ten a.m.

Q. What experience have you had in reaching Mr. Underwood either by telephone or telegram with respect to the time involved where he lives on Vashon Island?

A. Telegrams have taken a considerable time for delivery. Sometimes they get through fairly soon. It may be an hour or two hours or four hours. I don't know. With regard to telephone calls, I have had no occasion to make a telephone call to Mr. Underwood.

Q. Have you had occasion to make one to Mr. Sweeney, who also lives on Vashon Island?

A. Not Sweeney, but other radio officers who did live on Vashon Island, and who have complained of telephone service, [424] that it is practically impossible.

In the case of one assignment, I was actually unable to reach the man, Mr. Casey, in time for him to accept the job. He would have accepted it, he told me later on when he came in. Had I been able to get him by telephone, he would have accepted the assignment.

Q. And is that the reason that this job was not referred to Mr. Underwood, that you could not reach

(Testimony of Carl W. Lundquist.)

him in time to send him on in three-quarters of an hour?

A. The time element was the controlling factor there.

Trial Examiner Hunt: Which particular job is that, please?

Mr. Darwin: That is on Union Exhibit 20.

The Witness: The Coastal Monarch.

Q. (By Mr. Darwin): Now, turn to Union Exhibit 21. Will you look at that for a moment and explain the circumstances which required that you assign a man quickly to that job?

A. Yes. That job sheet indicates that I first heard of the job being open on December 28 through Mr. Allgrunn in advising me he was not returning to the ship. The ship in question was the steamer Baranof, which is a passenger vessel, and that vessel sails on a regular schedule.

Mr. Allgrun had been chief radio officer on that ship for quite some time, and had previously arranged to take time off. And under what is or what has already been described [425] as the standby system it came time for the ship to sign on for this voyage, and on the morning of the 28th when the ship was signing on, immediately upon arriving at the office, I contacted Mr. Allgrunn, who lives in Tacoma, and is not always easy to contact because sometimes he is at home and sometimes he is not. He is a man who takes a little while to make up his mind, which is his privilege, but it makes it a little difficult in getting a man to replace

(Testimony of Carl W. Lundquist.)

him, because I have to worm out of him, "Are you going to sign on or not?" He finally said he was not going to sign on, and finally, at 9:00 a.m., the record shows, I called Mr. Felton of the Alaska Steamship Company and advised him of that.

Mr. Felton said, "All right. Send somebody else down.

Q. How soon——

A. The ship was signing on at 10:00 o'clock that morning.

Q. Under those circumstances were you able to reach Mr. Underwood?

A. Within one hour I couldn't take the chance. I had no guarantee that a telegram would get through to him in one hour or two hours. Incidentally, I might elaborate that here is an instance where I had Mr. Casey's name listed with no phone. I was unable to get him. That was the first thing in the morning.

Q. And that indicates that Newbill accepted and that he took the job? [426]

A. He was the next man interested. There may have been others in between. If so, I would have made a notation, "So-and-so declines." But he was next in line.

Q. Now, you do the best you can in running your employment office and filling these jobs under the exigencies that exist in filling them rotationally and with fairness to union and non-union operators applying for jobs, is that right?

A. I think so, yes.

(Testimony of Carl W. Lundquist.)

Q. Well, you know it as a matter of fact?

A. Well, I do my best, yes.

Q. Incidentally, there is a ferry running between here and Vashon? A. Yes?

Q. Do you know how often each day?

A. I haven't the slightest idea.

Q. It takes some time——

Mr. Teu: He says he hasn't the slightest idea. How can he speculate as to whether it would take some time? He said he hasn't the slightest idea.

Trial Examiner Hunt: All right. You need not argue it. I will sustain the objection.

Q. (By Mr. Darwin): Have you at any time talked to Mr. Underwood as to the length of time it takes? A. Not with Mr. Underwood.

Q. Have you talked with Mr. Casey? [427]

A. Yes.

Mr. Teu: I object.

Mr. Darwin: Mr. Casey lives on Vashon Island too, doesn't he?

Mr. Teu: I object, Mr. Examiner.

Trial Examiner Hunt: He may answer.

A. Mr. Casey does live on Vashon Island, to answer the question first, and he has indicated to me that transportation facilities down there are not of the best. When he comes to Seattle he more or less makes an expedition of it.

Q. Turning to Union Exhibit 22, it is headed, "Reported by newspaper reports." Will you tell us the circumstances under which you have to make that assignment quickly?

(Testimony of Carl W. Lundquist.)

A. This was not necessarily made quickly.

Q. Well, tell us about it.

A. The record will show that there was considerable time on that. The first indication of that job being open was a newspaper report which stated that the Alaska Steamship Company had bought the Edmund Mallet. You may notice on the job report sheet the name Edmund Mallet is crossed out and underneath is the name Iliamna. That newspaper account was on January 22. Knowing that the Alaska Steamship Company would normally call us for a radio officer for that job because it was in this area, I made a job sheet on which I wrote only such facts as where I got the information, [428] the name of the company and the ship.

On January 29 at 2:00 p.m. Mr. Felton of the Alaska Steamship Company called me and advised me they wanted a radio officer on the ship the following day. I did not call Mr. Underwood for that job because—despite the fact that it was an Alaska Steamship Company vessel—because of the fact that Mr. Felton advised me or confirmed previous information I had that that vessel was going under a four-months charter to the Pacific Far East Line.

Q. I see.

A. Mr. Underwood indicated he was not interested in a long voyage. He wanted to be home at quite frequent intervals.

Q. And for that reason you did not contact him about that job? A. I did not call him.

Q. Referring to union Exhibit 23, will you tell

(Testimony of Carl W. Lundquist.)

us the circumstances of the assignments of Allgrunn?

A. Well, that was an occasion somewhat similar to the previous ones in which Mr. Trevethan called me up on the morning of January 25, 1951, advising that he was in port on the steamer Nadina, and he would like to have a trip off if I could arrange—I am sorry—two trips off, if I could arrange for a relief operator. I said I would do my best, and asked him when the ship would be signing on. He said it was signing on that morning. He had not been able to call the [429] day before because the ship got in after the office closed.

I called Mr. Felton's office—the record does not show whether I spoke to him in person—at ten a.m. and advised him Mr. Trevethan wanted to make such an arrangement. They approved it, and thereupon I was in position to call a radio officer. They also confirmed the fact that the ship was signing on that morning, and that they did want a man to stand by that morning, and he was to report to Pier 42. So there again time became a matter to be considered.

Mr. Allgrunn happened to be in the office that morning, and he was in a position to be offered that job, and he accepted it and went down immediately. I presume he did immediately, because he left the office and went down to the ship and signed on.

Q. I will ask you to take a look for a quick minute at Union's Exhibit 11, which is the Seattle beach list of January 20, and ask you whether Mr. Allgrunn in addition to the reasons you gave for

(Testimony of Carl W. Lundquist.)

non-assigning Mr. Underwood did not also precede Mr. Underwood on the list?

A. He preceded him—let's see—this is a January 20th list——

Mr. Geisness: He lost his place.

A. (Resuming): Oh, yes, Allgrunn preceded Underwood on [430] that list.

Trial Examiner Hunt: How can you tell it?

The Witness: By his order on the list—in the typed order on the list. I started to elaborate by saying, however, he had not been employed longer than Mr. Underwood had at that time. He had gotten off the Baranof 90 days prior to that. In fact, it was exactly 90 days he was off the Baranof.

Q. (By Mr. Darwin): So except for the circumstances under which you would have had to make a quick assignment, would Mr. Underwood have been called?

A. He would have been eligible for that job, and he would have been called.

Trial Examiner Hunt: Let me pose something here that I do not understand.

Is it your testimony that Allgrunn did precede Underwood in order of rank on Union Exhibit 11? I use the word "rank" in the sense of priority for referral.

The Witness: It was my statement he did not.

Q. (By Mr. Darwin): Would Mr. Underwood have been called first except for the need to fill the job quickly? A. Yes, he would.

Q. Now, turning to Union Exhibit 24, in the

(Testimony of Carl W. Lundquist.)

first place you notice at the top "Reported by Healy (advised not rejoining)." That does not mean rejoining the union, does it? [431]

A. No. All notations on this pertain to the job.

Q. I see.

A. That means that the incidents pertaining thereto were that the Coastal Rambler, which had been temporarily chartered to the Grace Line some time in the fall, and Mr. Healy had been permanently assigned as radio officer for some time when the ship was chartered to Grace Line, and indicated he did not want to make that voyage down to Central and South America.

So he arranged for a trip off, and he took a standby clearance, and Mr. Sweeney was assigned in his place. The vessel came back, and Mr. Sweeney reported back in and asked if Mr. Healy was going to rejoin the ship—he further advised me—this was on the 30th—he further advised me——

Q. In January?

A. On the 30th of January, that there was some question that the ship might lay up for a while, it might not go into immediate service for the Alaska Steamship Company. So at two p.m. on January 30, I called Mr. Felton, and he advised me that the ship would not lay up, and that the job would begin on the 31st. Thereupon it was my duty, to contact Mr. Healy, who was on standby status for that job, and advise him to return to his ship on the 31st, or arrange for further standby and further relief as-

(Testimony of Carl W. Lundquist.)

signment because his standby [432] assignment was not limited to any particular number of days.

I was not able to get Mr. Healy that afternoon, and the notation shows he advised me on the 31st the first thing in the morning that he was not going to rejoin the ship, and advised me he had obtained employment ashore, and he was not interested in rejoining the ship.

Q. That was on the morning when the signing on was supposed to occur?

A. That is correct. I did attempt to get him on the afternoon of the 30th, but I was unable to raise him. I had to leave a call for him.

Q. You have already explained that. And it was under those circumstances that you did not find it feasible to offer Underwood the job?

A. That is correct. It is my understanding of our obligation to the steamship company that when they say they want a man down there at a certain time to sign on, it is up to us to get one down there if we possibly can.

Q. As a matter of fact, you used the phrase, "beating the bushes for the last two or three months for men to take jobs," is that right?

A. That is correct.

Q. That is union or non-union?

A. Union or non-union.

Q. Permit card holders or no permit card holders? Is [433] that right? A. That is right.

Q. As a matter of fact, Mr. Lundquist, since the Korean war you have even had to assign in some

(Testimony of Carl W. Lundquist.)

cases men who are not even licensed under the FCC?

A. That is not permissible; only in MSTS.

Q. I was going to finish. To MSTS, who are unwilling to take men unlicensed, is that right?

A. That is correct.

Q. As a matter of fact you have also had occasion, too, of necessity, to telephone the San Francisco branch of our union? A. I have.

Q. To get people to come up for jobs, union or non-union, is that right? A. That is true.

Q. Turning finally to Union Exhibit 25, will you tell us the circumstances of that assignment? I notice that you say on the third line, "Begins February 6. About 35-day trip."

A. That is right.

Q. Was that one of those long trips which you understood Mr. Underwood held himself unavailable for?

A. Yes, though I did explain my understanding that a short trip would be a three-weeks' trip. Based upon the information received from him, I would have been—I would [434] have given him the benefit of the doubt concerning the length of the trip. There again the job report comes originally from the radio operator the first thing in the morning of February 6th, asking for one trip off, and he advised me that the ship apparently was going to make a turnaround. At least, the job was open that day, February 6th, and he advised me it would be a 35-day trip. I again called Mr. Felton's office and questioned them concerning the situation whereby

(Testimony of Carl W. Lundquist.)

there was a possibility of a different radio officer going out on the following trip, and they agreed.

"All right. If that is the way the operator wants it, it is all right. Go ahead and assign him." So I had to do my best to assign an operator. I may say here—I think I should say here, to clarify the situation, that there have been cases, there have been three cases recently where radio officers with the Alaska Steamship Company have come in and asked for relief, and I have told them there is nobody available, and they will have to stay on the job or get off permanently and let the thing lay in my lap, and have somebody else assigned. That is because of the manpower situation.

Under those circumstances the men have agreed to remain with the ship.

Now, there again, it was a case of the company wanting a man down there at the dock to sign on, according to my information [435] and the information given me, and I can't risk ignoring the dissatisfaction of the company with regard to service the union renders them as to assignment of radio officers. I had to use my own discretion as to who I could call of the three men I did call, which were Oku, a transient. He was staying in a hotel in Seattle. He came down at nine o'clock. Sweeney was staying in Seattle and Ashley was staying in Seattle. Ashley accepted the assignment. He came down immediately and took the assignment and went within 20 minutes.

Trial Examiner Hunt: What is the meaning of

(Testimony of Carl W. Lundquist.)

the term "deferred list," as it appears on some of these exhibits, referring particularly to Union Exhibit 17?

The Witness: "Deferred list" is a category which stems from the old constitution prior to the one now in effect pertaining to status of membership under the procedure for reinstatement into membership of a former member who has resigned from the union.

At one time or another under the old constitution such member was accepted back into the union in accordance with shipping conditions.

In other words, the union did not feel it was fair to such member to say, "All right; we will reinstate you right now. But you may have to stay on the list six months and pay dues in the meantime without a chance of getting a [436] job."

Therefore a system was worked out whereby these men were placed on an available list for assignment, but they were not actually reinstated into the union nor were they required to pay dues into the union until such time as they were free to accept an assignment.

At that time their new membership or reinstated membership became effective.

Now, under the present circumstances, men who resign under the present constitution are accepted back upon payment of a reinstatement fee and dues. However, those who resigned under the old constitution—the union doesn't feel it would be fair to tell those men, "You can go and come back without any reinstatement or back dues or anything else," at

(Testimony of Carl W. Lundquist.)

that time, and now tell them, "You have got to pay a reinstatement fee."

Therefore, they are permitted to reinstate themselves into the union under the conditions in effect when they left the union. It is a term used more for the benefit of the rank and file members who come into the union hall and look at the list and want to know where did these fellows come from, and who——

Q. These lists are posted—oh, I am sorry. Did I interrupt?

A. Go ahead and ask the question. [437]

Q. Are these lists posted, both the national lists as well as the port lists each week at a prominent place in the union hall?

A. I have them sitting right on my desk, on top of the desk, where any man who comes in to ask, I hand it to him and say, "There it is."

Q. Have you ever made it a condition for registration for employment that if a man came in, he had to join the union? A. No.

Q. Have you ever made it a condition for registration or assignment for employment of Mr. Underwood that he join the union? A. I have not.

Mr. Darwin: Now, pursuant to my request——

Trial Examiner Hunt: Is it the substance of this witness' testimony that on Union Exhibit 11, for instance, although Underwood's name does not appear with a number beside it indicating a place on the list, in practical effect Underwood was number one on the list?

(Testimony of Carl W. Lundquist.)

The Witness: I don't know whether he would be number one. I don't know whether he would precede these two. Both of these men have been unemployed for a considerable length of time, over a period of a year, and they are well up on [438] the list.

Trial Examiner Hunt: Griffin and Ember in the column, "not ready" on Union Exhibit 11. Then on Union Exhibit 12 it is indicated that Dittberner took the assignment on the Coastal Rambler. Was it the substance of your testimony that Underwood, whose name appears near the bottom of Union Exhibit 12 without a number opposite it, was in fact a rank above Dittberner?

The Witness: Yes, as to the length of employment, yes.

Trial Examiner Hunt: I should think this witness should be asked why Underwood was not given a numerical rating, and why his name appears in a limited group at the bottom of a number of these exhibits.

Q. (By Mr. Darwin): Do you want to explain it?

A. Do I understand it as a question?

Trial Examiner Hunt: I suggest to counsel that you put it as a question.

The Witness: That is why I hesitate.

Mr. Darwin: That is a question.

A. If it is a question, all right. The answer to that question is what I have already stated, that Mr. Underwood has never come in to me or to any-

(Testimony of Carl W. Lundquist.)

one else in the office while I have been here or at any time prior that I know of and registered to go on the assignment list. The list is made up and assignments are made in accordance with a set of rules which is national in scope, and which is definitely just as [439] applicable to the Seattle branch as anywhere else. I have no right to deviate from those rules, and neither has any other port official who may place Mr. Underwood's name or anyone else's name on that national list, unless such applicant for employment as a radio officer specifically fills out—and all he has to fill out is his signature because I fill in the rest of the data indicating his name, the port where he wants to ship from, and the date he goes on the list.

Now, because shipping, being what it is, and because I have no desire to persecute Mr. Underwood or anybody else that I can think of at the present moment, I felt that I was bound in my own conscience to hold him available for assignment in some manner, even though I could not list him on a master assignment list, and I had to figure out to my own satisfaction and in my own mind according to the facts I had, what I could ascertain from Miller and Underwood, as to his length of employment, his possible registration date, and how that would affect him on the list.

Mr. Underwood would not agree with that, and he would never fill out an assignment slip which would permit his name going on the [440] master list.

* * *

(Testimony of Carl W. Lundquist.)

Q. (By Mr. Darwin): Looking for a moment at Union Exhibit 5, December 1, 1949, you will notice that Underwood indicated on that date that he was going to the Seattle active list from the Palisana?

A. That is correct.

Q. In between that time had it come to your knowledge he was employed? A. It had.

Q. Employed where? In the cannery?

A. Yes. [441]

Q. What is the rule that you apply indiscriminately to union and non-union members alike under our shipping rules, Union Exhibit 1, with respect to a registration of a man with the union hall after he has been employed?

A. The shipping rules are very specific in stating that a man coming off a job or changing his category on the assignment list in any way must fill out a new form indicating that.

Q. An application?

A. An application requesting that new status, whatever it may be.

Q. Now, it having come to your attention that Mr. Underwood was employed by a cannery until some time, I believe, in the middle of October, October 9 or some such date, is it the requirement under the shipping rules that he come in and register again?

A. Providing he wants an assignment, yes.

Q. That is what I am driving at. And you have already testified he never did come in to apply for a job?

(Testimony of Carl W. Lundquist.)

A. Not to apply for a position on the list, [442] no.

* * *

Q. (By Mr. Darwin): Now, does a radio operator have to have certain qualifications before you and the Seattle employment office will refer him to a job to any ship owner? A. Oh, yes, he does.

Q. How many qualifications, how many categories of qualifications that you know of do you have to be concerned about?

A. Well, at least three.

Q. Well, give us the first one?

A. The first requirement is that the person must hold a license as a radio operator issued by the Federal Communications [455] Commission, a second-class or better license,

The second requirement is and had been for quite some time that he must also hold a radio officer's license issued by the United States Coast Guard. That regulation became effective in the summer of 1948.

* * *

Mr. Darwin: The line of questioning and the answers I hope to elicit from Mr. Lundquist will develop that there are at least three prerequisites of qualifications at a particular [456] time, on a particular day, which an employment office dispatcher or a port agent must know about before he can dispatch, under government regulations, any operator to a job of the kind involved in Mr. Underwood's case, and it has nothing to do with the personal

(Testimony of Carl W. Lundquist.)

competency of handling the equipment by Mr. Underwood or anybody else.

Trial Examiner Hunt: All right.

Q. (By Mr. Darwin): Now, you have been interrupted by Mr. Teu, and you have given two categories. What was the third?

A. The third category is what is known as a loyalty screening. That requirement went into effect on the 1st of October, 1950.

Q. Do you know the basic regulation of that?

A. Of the last requirement?

Q. Yes.

A. The basic regulation of that requirement is that a person shall not be——

Q. No. A. Oh, I am sorry.

Q. I stopped you from answering. Go ahead.

A. He must not be a bad security risk.

Mr. Darwin: May I ask the Examiner to take judicial notice—I have always thought it should be administrative notice and judicial notice of the contents of the President's [457] Executive Order —and I am sorry I don't have the number—issued some time prior to October 1, 1950, and particularly, after the Korean war flared up, under which the United States Coast Guard is the agency by such executive order to inquire into the security of seamen, including radio operators sailing upon American flag-flying vessels.

The Executive Order was implemented by regulations promulgated by the United States Coast Guard, and it has been from about October 1st

(Testimony of Carl W. Lundquist.)

amended several times to include all waters upon which American flag-flying vessels sail.

First the regulations covered only offshore between here and the Pacific Korean waters. Subsequently, by amendment, the regulations requiring security checks by the Coast Guard have now and by the latest amendment of January 30, 1951, been made effective to include sailings of seamen not only offshore but coastal waters, intercoastal, intercoastal meaning between the coast on the Pacific and the coast on the Atlantic, and Gulf ports and inland waterways.

Mr. Teu: You request that he take judicial notice of all the matters covered in your statement?

Mr. Darwin: That is right. I will also ask the Examiner to take judicial notice of the Congressional Act—I think it is 526 or some such number. I don't have it. I will furnish it some way if the General Counsel won't object. I will be glad to furnish it in the form of a letter [458] when I get back to San Francisco, with a copy to you, if the Examiner will accept it that way. They are matters which you can go into in the brief.

I will make a quick reference to the Congressional Act about the middle of 1948, which was much before Korea was ever thought of, requiring a radio operator, who was by that Congressional Act made an officer aboard a vessel comparable to the mate, first mate, chief engineer, and so on.

By that statute the Coast Guard was required to screen all radio operators for security—not security

(Testimony of Carl W. Lundquist.)

—yes, I beg your pardon; they were required to check their radio operators for security and for other reasons as to whether or not they were entitled to get by the Coast Guard a license as a radio officer.

The first requisite which Mr. Lundquist referred to is, of course, the Federal Communications Commission license applying to Class A and Class B licenses, or first class and second class licenses.

Q. (By Mr. Darwin): Now, as to each of the categories that you mentioned, is it the duty of an employment agency such as the Seattle branch is, to make inquiry before a man is dispatched to a job? A. Yes, it is.

Q. Now, if a man does not come up to physically register [459] for an assignment on a job request form or job application blank, have you any means of ascertaining any one or all three of these prerequisites before you send the man to a job?

A. The only way I could make sure would be to see the documents themselves which the man would bring in when he registered.

Mr. Darwin: At this time, Mr. Examiner, I direct your attention to General Counsel's Exhibit No. 4, Section 2, under Hiring, the third paragraph (Reading):

"Preference shall be given to the radio officer longest unemployed who is qualified, competent and satisfactory, and who can present proof of previous employment on vessels of one or more of the companies under agreement with the Association, and

(Testimony of Carl W. Lundquist.)
who has worked as radio officer on U. S. flag vessels during the two-year period immediately preceding signing of this agreement and who has experience on a job similar to that which is offered."

The emphasis is on qualified, competent and satisfactory.

The next paragraph, "The Association—" —in this instance the Association referred to is the ARA —"agrees to maintain, administer and operate its employment offices and to apply the aforementioned preferences in accordance with the laws, and assumes the sole responsibility therefor."

And the emphasis there is that the Association is to [460] administer the employment office in accordance with the law and assumes sole responsibility therefor.

The next paragraph, "When filling vacancies all radio officers shall produce official assignment clearance from the Association employment office."

And you will observe, Mr. Examiner, throughout this agreement, which is GC Exhibit 4, it says "Radio officers" as distinguished from the first agreement of December 3, 1948, which was No. 3, and which was in effect prior to the Board's order in April, 1950, which used the word "members"— will give preference to members.

And I also direct your attention, Mr. Examiner, and I do it at this point of the transcript because the reader of it would find it helpful at this point— I direct your attention, Mr. Examiner, to Union's

(Testimony of Carl W. Lundquist.)

Exhibit No. 1, the assignment rules, particularly rules 5-a, 5-b, 6-a, 6-b, and 6-c.

I think I ought to get it physically into the record, with your permission.

Rule 5-a provides, "All radio officers desiring to obtain employment shall register for the assignment list, and shall be designated as active for a specific branch hiring hall of the union."

Rule 5-b: "Radio officers shall be registered on the assignment list as of the day and hour application is received [461] irrespective of the date the radio officer registering left his last job."

Assignment list forms, Rule 6-A, "A radio officer registering on the assignment list shall fill out in full an assignment list application form provided by the union."

Rule 6-b: "Each branch hiring hall shall forward all assignment list applications to the office of the secretary-treasurer."

Rule 6-C: "The files of the secretary shall contain a copy of the official assignment list applications filed by each radio officer."

Q. (By Mr. Darwin): Now, Mr. Lundquist, reference in these rules as I have read them to you, to assignment lists, has reference to which part of Union Exhibits 28 and 29?

A. That reference will be to the first part.

Q. All right. Now, did you, at my request, prepare a list of non-union radio officers from the national lists of all of the union branches between June 29, 1950, and February 17, 1951, the latter

(Testimony of Carl W. Lundquist.)

date being the date closest to the holding of the hearing here in Seattle last month?

A. Yes, I made such a list.

Q. Now, why did you select June 29 as the starting point?

A. That date was the first date on which the assignment of a radio officer not in the union appeared.

Trial Examiner Hunt: That follows the promulgation of [462] the new regulation and shortly precedes execution of the present contract, is that the point?

* * *

The Witness: No, not necessarily. I did not choose the date with that in mind. There may be a coincidence there.

But prior to that date the shipping conditions had been such that non-union members or union members—non-union members found it more practical to apply for employment at ports where there were no union employment offices. There was a considerable surplus of men over the jobs available, and the union members wishing to ship through the union facilities registered and were available at the ports where the union maintains an employment office.

Now, there are only six of those from which they could ship. There are six employment offices, whereas there are many more than that number of seaports on both coasts. Competition for employment by a radio officer not a member of the union

(Testimony of Carl W. Lundquist.)

was found to be less at the ports where the union did not maintain an office. These men, after shipping began to increase, found it practical to obtain employment in the ports also where the union maintained offices, and consequently made their applications and were assigned from those offices beginning on or about that date.

Q. What were the job opportunities in ports in which the union has branches, with specific reference to Seattle, since [463] this is the only port that is under inquiry here? Will you confine yourself to job opportunities in the Seattle branch?

* * *

Q. (By Mr. Darwin): Was business good or bad? A. No, definitely bad.

Trial Examiner Hunt: We are still talking about why he started out with the June, 1950, date, aren't we?

Mr. Darwin: Yes.

Trial Examiner Hunt: What date was embraced in the last question?

Mr. Darwin: Prior to June 29, 1950.

The Witness: Shipping conditions in Seattle were bad up to that date and for a short period beyond that date.

* * *

Q. (By Mr. Darwin): Now, Mr. Lundquist, from your own experience as an official of the radio unions, and your knowledge of the maritime industry with respect to maritime employees, can you

(Testimony of Carl W. Lundquist.)

give it as your opinion as to whether or not [464] in this industry unionization is highly organized?

* * *

A. Yes, the industry is quite highly organized; not 100 per cent, but I would say 80 to 85 per cent as to the radio operators. [465]

* * *

Q. (By Mr. Darwin): Were there many applicants for inclusion on the assignment list in the Port of Seattle of non-union men prior to June 29, 1950?

* * *

A. No, there were very few.

Q. As far as you know, was there anyone other than Mr. Underwood prior to June 29, 1950, who was a non-union applicant in the Port of Seattle?

A. No, there was no one else.

Q. Now, following his resignation, referring to Mr. Underwood, when does his name next appear on the national assignment lists, and what is his place on that list by way of number? [467]

* * *

A. Mr. Underwood's name did appear on the following assignment list, on the next assignment list dated December 31, 1949. His number at that time was 828. It appeared again on the list of January 7 under the number of 796.

* * *

Q. Now, referring to Union's Exhibit No. 27,

(Testimony of Carl W. Lundquist.)

which you have already identified as a chronology of assignments of radio officers for Alaska Steamship Company vessels from December 1, 1949, to February 24, 1951—and the latter date is just two days before our last hearing—have you indicated on there with respect to Mr. Underwood's number 796 on the list of January 7 whether or not in the regular course, and assuming Underwood had remained a member of the union since January 7, 1950, would there have been—would he have been assigned to any Alaska Steamship Company jobs between that date, namely, January 7, 1950, and November 8, 1950, by the use of the assignment rules then existing and indiscriminately applied to all applicants for jobs? [468]

A. No, that record indicates he would not have been assigned to any of those jobs between those dates.

* * *

Q. (By Mr. Darwin): Now, will you be good enough to take Union's Exhibit No. 27 now in your hand, and explain, first of all, the significance of all entries on there, having the legend, "Reassigned to SS Baranof from standby," beginning with January 6, 1950, for Mr. Allgrunn, and all the way down the line wherever the phrase, "Reassigned" to a certain vessel "from standby"—just what did that mean?

A. That designation, "reassigned to SS Baranof from standby"—the first one, indicates that Mr. Allgrunn had been or was permanently assigned to

(Testimony of Carl W. Lundquist.)

the ship, and he had been on standby for one reason or another, perhaps a vacation trip—I am not saying just exactly why—but it was not a [469] temporary assignment by any means.

Q. All standby references on that list relate to men who were attached to the vessel as permanent job holders on the vessel? A. That is correct.

Q. And in no event would Mr. Underwood have been entitled to assignment to any of those ships, is that right? A. That is correct.

Q. Now, taking up Mr. C. V. Wagoner, will you explain the circumstances under which Mr. Wagoner, the first name on that list, was assigned to the MS Palisana on December 27, 1949?

Mr. Teu: That is on Exhibit 27?

Mr. Darwin: That is right—the first name there on the list.

* * *

A. That entry indicates that there was a radio officer's job open on the Palisana on that date. So the man longest on the unemployed list was given first call. Mr. Wagoner held position number 310 on the list on such date. He had the lowest number on the master list, and therefore was assigned to the job.

Q. Did he also have the lowest number on the beach list for assignment to that job? [470]

A. On the port list, you mean?

Q. Port list? A. Yes.

Q. Now, you recall Mr. Underwood had been on the Palisana just previous to that for two trips?

(Testimony of Carl W. Lundquist.)

A. Yes.

Q. Was that on a relief, or was that on a permanent assignment?

A. Mr. Underwood's previous assignment to that vessel had been a relief assignment.

Q. And that is borne out by Union Exhibit No. 5, which shows that assignment on the assignment slip? A. Yes, that is right.

Q. Now, taking up the next name, which appears with a star—and I take it that has reference to assignments to vessels other than reassignment from standby—will you explain in each instance whether or not Mr. Underwood could have been assigned to that job by reason of his relative numerical standing on the list as compared with the man who was actually assigned to the job, as shown on Union's Exhibit 27? A. Taking them——

Q. Right down the line. Take each one and explain the significance.

A. Mr. P. W. Pratt was assigned on February 14 to the [471] Lucidor as a temporary assignment.

Mr. Teu: Which item is that you are reading?

The Witness: February 14, 1950, Mr. Pratt was assigned to the Lucidor on a temporary basis, as a temporary assignment. His list number at the time he was assigned was 149, and using that as a check point and going back to the list of January 7, he was at that time No. 137.

* * *

(Testimony of Carl W. Lundquist.)

Q. To save time as we go along and explain each of these assignments, Mr. Underwood's number was 796 with respect to all men concerning whom you are now testifying—is that right?

A. On the list of January 7, 1950.

Q. That is right. Go ahead.

A. The next assignment is February 23 to Mr. Beall. He was assigned to the Square Sinnet, and his list number on January 7 had been 42 as compared with 796.

Trial Examiner Hunt: Wouldn't Underwood's number have changed from week to week?

The Witness: That is the reason I keyed it to the list of January 7. To answer your question, Underwood's name would have been rising on the list.

Trial Examiner Hunt: Am I to infer that all of the individuals to whom you are now referring and testifying [472] concerning were out of employment in the sense of not using their license from January 7, 1950, to the dates shown opposite their names on this Exhibit 27?

The Witness: You are referring to——

Mr. Darwin: The first date in the column on the list. That is right.

The Witness: Yes.

Q. (By Mr. Darwin): Will you proceed with the next?

A. The next assignment following that was on February 24, Mr. Tutt. He was assigned to the

(Testimony of Carl W. Lundquist.)

Denali, and on January 7 his list number had been 230 as compared to 796.

The next assignment was on March 8. Mr. Buer was assigned to the Coastal Monarch on a temporary basis. His list number on January 7 had been 812, but Underwood had indicated he was not interested in temporary assignments.

Q. In that instance Mr. Underwood would have been entitled to a referral to that job except for a limitation, the limitation imposed by himself?

A. That is correct.

Q. For permanent jobs?

A. Yes. The next assignment following that is March 14; Mr. Trevethan was assigned to the SS Nadina. On January 7 his list number had been 240.

Q. As compared with 796 for Mr. Underwood?

A. As compared with 796. [473]

Q. Go ahead.

A. On March 23 Mr. Beall was assigned to the Square Sinnet. He had been number 42 on January 7.

On April 5, 1950, Mr. Healy was assigned to the Coastal Rambler.

On January 7 his number had been 536 as compared with 796 for Underwood.

On April 8, 1950, Mr. Pratt was assigned to the Lucidor, and his number on January 7 had been 167 as compared with 796 for Mr. Underwood.

On April 21, Mr. Hallett was assigned to the

(Testimony of Carl W. Lundquist.)

Flemish Knot. His list number on January 7 had been 598.

The next assignment is Mr. Deyo. He was assigned to the SS Alaska. It does not say in what category. I did not list his category. That is a passenger ship which had carried and still does carry three operators. I have a notation there, "January 7, 793," which I have lined out. I will have to check it. I don't remember. It is quite a while since I compiled this list, and I don't recall now as to why I lined that number out.

But in any event, No. 793—let's see. Mr. Underwood had been No. 796.

Going on—following that the next assignment—the next two assignments were made at the same time on May 16th. [474]

Mr. Goodrich and Mr. Wickens were assigned as assistant radio officers on the Aleutian, and there appears, respectively, on January 7 numbers 749 and 583 as compared with 796.

On June 28, Mr. Hibbs was assigned to the Victoria.

On January 7 his number had been 324 as contrasted with 796.

Mr. King was assigned on the same date to the Ring Splice. His number had been 347.

On July 12 Mr. Moe was assigned to the Denali on a temparory basis. His number had been No. 732.

On July 15 Mr. Northstrom had been assigned—was assigned to the Coastal Monarch on a temporary

(Testimony of Carl W. Lundquist.)

basis, and there is another instance where Mr. Underwood's number as of January 7 was a smaller number than Mr. Northstrom's but on July 15 that assignment was also a temporary assignment.

Q. You mean a temporary job?

A. A temporary job. It was not a permanent assignment.

The next assignment was on August 3, 1950, of Mr. Ember.

That was also a temporary assignment to Mr. Ember. His list number had been 524.

The assignment following that on August 10, 1950, was to Mr. Carter, assigned to the Joliet Victory in New York, and that ship was not engaged in the Alaska trade. She was engaged overseas, which Mr. Underwood had indicated he [475] did not want.

Incidentally, I might add that the Joliet Victory is not owned by the Alaska Steamship Company. It is operated for the MSTS by Alaska Steamship Company. It is a temporary situation.

Then the next assignment was on August 29, 1950. Mr. Wentworth was assigned to the Bedford Victory at Baltimore. The situation there is parallel to that on the Joliet Victory. It was a ship operated by—for the MSTS in the overseas trade by the Alaska Steamship Company.

That covers—you requested what date?

Q. Through November 8th.

A. On September 10 Mr. Newbill was assigned to the SS Denali from the bottom of the list. In

(Testimony of Carl W. Lundquist.)

other words, there were no men ahead of him available who wanted that ship. Mr. Underwood at that time was in Alaska employed in a cannery. Incidentally, I think I might clarify matters by stating all these assignments with the exception of those otherwise noted were made at Seattle. I noted one at New York and one at Baltimore, I believe.

On September 11, Mr. Noah was assigned to the Ring Splice, also from the bottom of the list. Again, at that time Mr. Underwood was employed in a cannery in Alaska.

On September 12 Mr. Moe was assigned to the Victoria, and his list number on January 7 had been No. 732. [476]

The next assignment was on October 14. Mr. Newbill was assigned to the Victoria, and that is indicated as a pierhead jump. That is the time—that is a term we use when a job must be filled at the very last moment. The previous operator had missed the ship, and Mr. Newbill went down there on a rush and just got aboard in time to prevent the ship's being delayed.

Q. In connection with pierhead jumps, that occurs infrequently and where an emergency arises, where you pick up the first man whom you can get, so that the vessel is not prevented from sailing?

* * *

A. That is right.

* * *

(Testimony of Carl W. Lundquist.)

Q. Go ahead. [477]

* * *

A. And following that on October 18 Mr. Zink was assigned to the Ring Splice. The Ring Splice was going on charter to Grace Line, and was going to operate to South America on a voyage of between two and three months, which Underwood had indicated he was not interested in.

The next was on November 8th. Mr. Capp was assigned to the Denali, and his list number on January 7 had been 340, as compared with 796.

Q. Now, Mr. Lundquist, why did you stop in that review, in your review of this list, at the date of November 8, 1950?

A. The reason I stopped there was that the assignment of Mr. Capp to the Denali was the assignment of the last man on the assignment list of January 7, ahead of Mr. Underwood. [478]

* * *

Q. (By Mr. Darwin): All right. Now, on October 13, 1950, you sent Mr. Underwood a wire which has already been read into the record offering him a job on an MSTS vessel? A. Yes. [481]

* * *

Q. Did Underwood telephone you in response to that telegram? A. Yes, he did.

Q. What did he say?

A. He advised me—he asked me for such information as I could give him about the jobs, what they were, how long they were going to last, and so

(Testimony of Carl W. Lundquist.)

forth, and he concluded by saying he would rather wait for an Alaska Steamship Company vessel.

Q. On December 19 you sent him a telegram with a job offer, did you not? A. Yes, I did.

Q. Looking at that with the notes you have made, will you tell us, after refreshing your recollection from that as to what transpired between you and Mr. Underwood?

A. Yes, that telegram was sent at 1600 o'clock. That would be four o'clock in the afternoon, on December 19, as soon as I had the information the job was open. At ten o'clock in the morning of the 20th Mr. Underwood called me at the office and said he had received my wire, and asked me if it was a job with the MSTS, and I told him it was not; I told [482] him it was with another government agency, the Fish and Wildlife Service, and I told him that was all that I knew about the job, and suggested he call a Mr. Bright, who was the person who had called me in turn, asking me to supply a radio officer.

I gave him Mr. Bright's telephone number, but I do not know whether or not Underwood contacted Mr. Bright or not.

Q. You wired him on February 19, 1951, and at that time did he give you any response?

A. Yes.

Q. That wire was with respect to a job offer?

A. That was with regard to a job with a ship under contract with ARA, and he phoned—I did not make any note as to when he phoned—but he said

(Testimony of Carl W. Lundquist.)

he would not be able—he did not say at first he would not be able; he said he would have to check with Mr. Teu to see whether he would be permitted to make the trip. And he called back again and said he would not be able to.

Q. Did he tell you why?

A. He said he had been subpoenaed to appear before the hearing.

Q. This hearing? A. This hearing.

Q. Was Mr. Underwood assigned a job on February 27, 1951? [483]

A. I believe the assignment slip was made out on the 27th, yes.

Q. Now, to what vessel? A. The Pacificus.

Q. Had Mr. Underwood indicated to you previously to such assignment that he was now available for a job other than a permanent job with the Alaska Steamship Company?

A. He had indicated that he was. Prior to that he had indicated he was interested in a permanent or temporary job with the Alaska Steamship Company.

Q. Now——

Trial Examiner Hunt: Who owned the Pacificus?

The Witness: The Coastwise Line. [484]

* * *

Q. (By Mr. Darwin): Mr. Lundquist, on the day of the previous hearing, February 27, to be exact, did you and Underwood have a conversation with respect to his preference for the kind of work that he wanted?

(Testimony of Carl W. Lundquist.)

A. I had a conversation with Underwood. I don't know whether he expressed a preference.

Q. What did he say?

A. The occasion arose when the job on the Pacificus opened up. I pointed out that the Pacificus was not an Alaska Steamship Company vessel, and that he had not previously indicated he wanted anything else; but asked him, nevertheless, whether he wanted that assignment; and he agreed he would take it. [485]

Q. And was that a change on his part from his preference for a permanent or temporary job on the Alaska Steamship Compnay to any job with any other company?

A. That was the first time he had indicated that he would accept any assignment other than to the Alaska Steamship Company.

Q. And in the regular course of his position on the list, was he entitled to that assignment?

A. He was.

Q. And he has been working on that since?

A. He has. [486]

* * *

Q. Now, Mr. Underwood also in his testimony said that you had told him about an extra list.

Is there any such list? A. No.

Mr. Teu: Just a minute. I don't think there is any testimony in the record about Mr. Underwood having advised—about Mr. Lundquist having ad-

(Testimony of Carl W. Lundquist.)

vised Mr. Underwood that there was an extra list.

If you are going to quote the testimony——

Mr. Darwin: All right. I will read it. I was trying to shorten it. (Reading):

"Question (By Mr. Teu): Did he say anything further about the regular assignment list?"

And Mr. Underwood answered: "Yes, he said, 'We have the active, the inactive, and the employed and the deferred, the permit card, and this extra list.'"

And then you asked him, "Question: What is the extra list?"

And he said, "I suppose applicants like myself." I asked that the answer be stricken.

Trial Examiner Hunt: You may answer.

A. No, I made no such reference to the extra list.

Q. Is there in fact an extra list?

A. There is not. [489]

* * *

Trial Examiner Hunt: That is not what I meant, I am sorry, Mr. Darwin. I understood from the testimony of the witness a possible inference that at one time everyone on the national assignment list was a member of the union, that it was the practice to have only members of the union listed on that list.

Now, he testified that as of today and for some time in the past that the list—the national list—is not exclusively composed of members of the union. [497]

(Testimony of Carl W. Lundquist.)

Is that correct so far?

The Witness: That is correct.

Trial Examiner Hunt: What is the date or approximate date when the practice was changed?

The Witness: As to the National list I would say June 15, 1950.

Q. (By Mr. Darwin): Now, Mr. Dallas Hughes, when he was here testifying and you were here to hear him, admitted that he had had other assignments from the union although he was a non-union member, but he claims he had no place on the assignment list.

Is that a fact?

Trial Examiner Hunt: The national list?

Mr. Darwin: The national list.

A. Is it a fact that he had no place?

Q. That is right. A. That is true.

Q. Now, give us the reasons for that.

A. The reason for that is that he did not come in and register for employment.

Q. You mean he has not physically wanted to sign an application blank, is that correct?

A. Yes.

Q. The means by which any man, union or non-union, is accorded a place on the national list, as to procedure? [498]

A. The procedure is that a radio officer qualified with all the necessary license papers comes in and indicates he wants to obtain employment through the facilities maintained by the ARA and indicates from what port he wants to ship. Then he fills out

(Testimony of Carl W. Lundquist.)

that form which has already been referred to, and signs it, to indicate that is his status, and the proper duplicate or triplicate, whichever it is, of that form is transmitted to the secretary-treasurer's office along with all other registrations, whether they be union or non-union men.

Q. And the form you refer to is our Union Exhibit 5?

A. Yes. And then when the following week's assignment list is made up, those names will appear in the order of the dates of application.

Q. And would it then follow that if a man does not sign those, he cannot thereafter physically appear on the assignment list?

* * *

A. A person's name could not appear unless he had filled out such a form. [499]

* * *

Q. (By Mr. Darwin): Mr. Hughes said at page 72 that he had registered with you for employment. Did he ever physically sign any paper for such registration?

A. When you say "ever" you are referring to how far back?

Q. From the time you have been here.

A. No.

Q. He said that you did make assignments of non-union men despite the fact that they did not sign application blanks——

A. Because of the fact that shipping was such that we had to go wherever we could to get them in.

(Testimony of Carl W. Lundquist.)

If we didn't have men available on our own port assignment list, then we would have to go scouting around elsewhere to other unions, or to whatever source there might be a free lance or wherever I might hear of a man available for an operator's job.

I would get in touch with him and ask him if he wanted [500] the job. [501]

* * *

Cross-Examination

By Mr. Hull: [502]

* * *

Q. On what occasions does the Alaska Steamship Company call the employment office of ARA to secure personnel for its vessels?

A. When a ship re-enters service from lay-up service, or when they have purchased a new ship, or when the previously assigned radio officer has indicated he is resigning from service, and in cases where the operator does not show up and misses the ship. [503]

* * *

Cross-Examination

By Mr. Teu:

Q. Mr. Lundquist, certainly to me the record is not clear with respect to registration of members of ARA as well as registration of non-members at the time such registrations were accepted. For how long—for what period of time is a registration good once you register with the union?

(Testimony of Carl W. Lundquist.)

A. Registration for employment?

Q. Right.

A. Until such time as that person obtains a job, either through the facilities of the union or otherwise. And that job may be on a ship or it may be in a cannery or in a coast station, any job at all which involves and requires the use of that person's radio operator's license. [505]

Q. At the end of such time is it a requirement of the union that he must personally appear at one of the port agencies of the union and re-register?

A. If he wishes to be available for employment, yes. [506]

* * *

Q. (By Mr. Teu): Mr. Lundquist, is there anything in the records of the Seattle port office which show what action was taken upon Mr. Underwood's resignation as is manifested by Union Exhibit No.—I don't know what the number is.

Trial Examiner Hunt: Just a minute. It is No. 6.

A. That would be indicated in the minutes of the port branch membership meeting.

Q. I say is there anything there to indicate that they did act on his resignation? A. Yes.

Q. What is the nature of that particular evidence in the files of the port——

A. In the files of a membership meeting it is recorded that the port agent brought this matter, this letter, to the attention of the meeting, and the meeting voted to accept it.

(Testimony of Carl W. Lundquist.)

Q. And his resignation was accepted as of that date, the date of the meeting? A. Yes.

Q. Do you recall the date of the meeting?

A. No, I do not.

Q. Can you give an approximate date?

A. It would be quite early in January. It would have been, [512] I am quite sure, before the 10th of January.

Q. Of 1950? A. 1950. [513]

* * *

Q. That is also true with the entry of 3/28/50 on Union Exhibit 28? A. Yes.

Q. You testified that Underwood's position, I believe, on December 1, or whenever this list was made up, was 828 on the national list?

A. No, on the list of January 7, his number of —his number was 796. The number 828 was on the list of December 31, at which time he sent in the resignation.

Q. Now, that is on the national list? [519]

A. That is correct.

Q. What was his position on the Seattle list, or number on the Seattle list?

A. On January 7 he was 21 on that list at that time, but he was not available for assignment. So the man next in order after him was given 21.

Q. He was actually moved up as it were during all this period on the national list as well as on the Seattle port list?

A. He had been moving up since [520] December 1.

(Testimony of Carl W. Lundquist.)

* * *

Redirect Examination

By Mr. Darwin: [527]

* * *

Q. Mr. Lundquist, I was very much surprised at your statement that if a man is employed long enough he drops off the list completely.

Will you briefly and quickly explain just how that occurs?

A. Yes; a man first of all of course is on the active list, somewhere on that list in accordance with how long he has been unemployed, until such time as he gets an assignment.

At the end of the week, when he gets an assignment, when the next list is compiled, his name is moved over from the active column to the employed column, and down thirty [528] numbers. For instance, he may have been number one active. If he is given an assignment the following week he appears as number 31 in the employed column. Or he may have been 450 in the active column. When he accepts employment or assignment, the next week his number is 480 on the employed column. He continues going down the list at that rate, 30 numbers every week, and if he remains employed long enough so that his name reaches a number equal to the number held by the last man on the active assignment list, and if he remains employed, then his name no longer appears in the employed column. The em-

(Testimony of Carl W. Lundquist.)

ployed column is limited to the foot of the active list.

Trial Examiner Hunt: For the purpose of clarity, let me ask this: There isn't a separate list of members for the active, inactive or unemployed columns? We have only one series of numbers. The names set forth opposite the numbers are set forth in one of three columns. An individual, as on Union Exhibit 28, named White, has the number 70. He is in the employed column and the first individual in that column. Now, you can continue on looking in the employed column for the names of individuals working with numbers assigned in the way the witness related to you until you get to the bottom of the list. The bottom of list must, as I understand the testimony of the witness, contain the name of an active or inactive radio operator, and there is no purpose [529] in further lengthening the list by setting forth other individuals who might be employed with a number lower than that of the active or inactive man at the bottom of the list. Is that what you are saying?

The Witness: That describes it specifically.

Mr. Darwin: That is all.

Trial Examiner Hunt: The purpose of this list is not so much to maintain records of individuals who are employed, but those who are unemployed?

The Witness: That is right.

(Testimony of Carl W. Lundquist.)

Recross-Examination

By Mr. Teu:

* * *

Q. Now, when did you remove, if you did remove, Underwood's name from the national list?

A. I didn't remove his name.

Q. Was his name removed? A. Pardon?

Q. Was his name removed? [530]

A. His name was removed from the list, I believe, in the week following January 7.

Q. As action at that time by the union on his resignation?

A. That would be the following list, yes.

Mr. Teu: That is all.

Redirect Examination

By Mr. Darwin:

Q. If Underwood had come in and signed a registration slip like the one in Union's Exhibit 5, following his removal from the list, would he then have gone on again?

A. If he had re-registered, yes.

Q. If he had re-registered? A. Yes.

Mr. Darwin: That is all.

Recross-Examination

By Mr. Teu:

Q. Are there any shipping rules under which you operate now other than contained in, I believe, your Exhibit 1?

(Testimony of Carl W. Lundquist.)

A. No, those are the only shipping rules.

Q. The only shipping rules?

A. And they determine the operation of the ports.

Mr. Teu: That is all.

Trial Examiner Hunt: I am under the impression that the last answer of the witness in response to a question by Mr. Darwin is inconsistent with his other testimony. [531]

Mr. Lundquist—the witness is nodding; apparently he see what I have in mind. Do you want to go ahead and give your answer in addition to any statements you made previously?

The Witness: I see what you are driving at. My statement should have been qualified to state that subsequent to June 15, when the new shipping rules went into effect, the national list included both members and non-members, and his name would have appeared on the national list had he registered.

Trial Examiner Hunt: That was my point. I think a resasonable interpretation and perhaps the only reasonable interpretation of the witness' testimony is that following action by the union upon Underwood's letter of resignation Underwood's name was stricken from the national list.

It was stricken from that list because he had resigned from the union, and that if at any time after the promulgation of the new rules, that is, shipping rules, if Underwood had executed a form like that which appears at the bottom of Union's Exhibit 5 showing that he wanted to be on the active list in

(Testimony of Carl W. Lundquist.)

Seattle, he would have been given a place on the national list. Is that a reasonable interpretation?

Mr. Darwin: That is correct. [532]

* * *

Trial Examiner Hunt: Was it Underwood's testimony that he wanted a job in that run with any company other than the respondent company?

Mr. Teu: He wanted an Alaska Steamship Company ship.

Trial Examiner Hunt: Is that your recollection of his testimony, Mr. Teu?

Mr. Teu: I don't think there is any testimony to the effect that he would have taken an assignment on any other lines shipping in the Alaska trade. I don't recall any to that effect. [537]

* * *

Trial Examiner Hunt: I am sorry. I may not have made myself clear. I don't recall any testimony by this witness that Miller told the witness that there had been such a conversation with Underwood. I am afraid an inference has been drawn by the union from Underwood's resignation.

I understood the witness to testify that Miller told him that after the resignation Underwood had not been called for some time, but the witness also testified that Miller told him that during the summer of 1950 Miller had tried to reach Underwood, and had learned that Underwood was in Alaska.

My question was, did Miller state why he had tried to reach Underwood, despite the fact that

(Testimony of Carl W. Lundquist.)

Underwood had not physically come in to register on an assignment registration slip of the type in Union Exhibit 5. [545]

Do you know the circumstances that caused Miller to seek out Underwood?

The Witness: I think I do, yes. Miller, as I believe I previously indicated, when I received the charge, acquainted me with as much of the Underwood matter as he could; and he said first of all—he related that prior to the resignation he understood, and in fact that it was his understanding from that resignation, that Underwood preferred to ship elsewhere.

Then he said also there had been some correspondence between Alaska Steamship Company and himself, and he had stated his position, that the union was not going to discriminate against Underwood because of non-membership; and subsequent to that he had called Underwood on at least one occasion during the summer——

Trial Examiner Hunt: Tried to call him?

The Witness: Or had placed a call to him, and had been advised by Underwood's daughter that Underwood had accepted employment in Alaska, and I also understood from Mr. Underwood's own testimony here that Miller actually did contact him in person with regard to the relief assignment on the Baranof. [546]

* * *

(Testimony of Carl W. Lundquist.)

Redirect Examination

By Mr. Darwin:

* * *

Q. Between December 1, 1949, and June 1, the date last mentioned by Mr. Teu, June 1, 1950, were radio operators, union and non-union, dispatched indiscriminately?

A. Between December, 1949, and June 1, 1950?

Q. And June 1, 1950. If they filed applications?

A. If they filed applications, yes. [555]

* * *

Q. (By Mr. Darwin): Were the employment opportunities made equally available to union and non-union members between about December 1, 1949, and July 1, 1950? A. Yes, they were. [559]

* * *

J. F. ZUMDIECK

called as a witness by and on behalf of Respondent Alaska Steamship Company, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Hull:

Q. By whom employed?

A. Alaska Steamship Company.

Q. In what capacity?

A. Operating manager.

Q. How long have you been employed in that capacity? A. Approximately 5 years. [560]

(Testimony of J. F. Zumdieck.)

Q. And how long have you been employed by the company? A. About 14 years.

Q. Prior to your duties as operating manager, in what capacity did you serve? A. Pardon?

Q. Prior to taking over your duties as operating manager, what capacity did you have with the company?

A. Oh, various duties. Dealing with our labor relations and stevedoring and clerical work in the Operating Department.

Q. What are your duties as operating manager of the company?

A. General supervision of the operation and maintenance of the company's vessels.

Q. In connection with your duties, are you familiar with the manner in which the Alaska Steamship Company obtains radio operators on its vessels? A. Yes, I am.

Q. Now, how does the Alaska Steamship Company obtain its radio operators on its vessels?

A. Through the office—I have got to be careful here, now (laughing). Through the ARA, I believe.

Trial Examiner Hunt: That is the right designation presently, ARA.

Q. (By Mr. Hull): And when the company calls for a radio officer for one of its vessels, how does it go about it? [561]

That is, what kind of a request does it make?

A. Well, our port engineer telephones the union hiring hall for a radio officer for a specific vessel.

(Testimony of J. F. Zumdieck.)

Q. How long has that practice been in effect, Mr. Zumdieck, to your knowledge?

A. I would say since 1935 that I am aware of.

Q. Are there other categories of employees employed by Alaska Steamship Company on its vessels?

A. There are.

Q. What are they? Can you name them?

A. Deck officers, engine officers, unlicensed deck personnel, unlicensed personnel, and unlicensed steward's department.

Q. Will you state whether or not it has been the practice of the Alaska Steamship Company to employ those other categories of seagoing employees through the employment office of the collective bargaining agent for the particular classification of employees involved? A. Yes, it has been.

Q. And how long has that practice been in effect?

A. I would say since—I would like to make a correction there. There is a variance in our deck officers and our licensed engine personnel. With the exception of those two groups and our staff officers, it has been our practice to call the union hiring hall to secure the rating requested. [562]

Q. Now, does the company itself maintain any offices or facilities for employing radio operators on its vessels itself? A. No.

Q. And it does not maintain any facilities for employing any other categories of the employees you mentioned? A. No.

Q. And that has been the practice of the company for some time past, hasn't it? A. Yes.

(Testimony of J. F. Zumdieck.)

Q. Now, Mr. Zumdieck, on or shortly after May 4, 1950, I want you to state whether or not the Alaska Steamship Company received a circular from the Pacific Maritime Association which in effect directed Alaska Steamship Company to cease giving effect to the hiring provisions of the then existing collective bargaining agreement between Pacific Maritime Association and the American Radio Association? A. We did.

Q. And were the instructions in that circular put into effect? A. No, they were not.

Q. I will ask you, Mr. Zumdieck, did the Alaska Steamship Company take any steps to put those instructions into effect?

A. They did not. [563]

* * *

Q. And was it because of the instructions contained in Company's Exhibit 1 that Alaska Steamship Company did not put into effect the instructions contained in the prior circular that you received from the Pacific Maritime Association?

A. That is right.

Q. And you abided by the instructions contained in Company's Exhibit 1 up until the time the new agreement was executed between PMA and the ARA, is that correct? A. That is right. [564]

* * *

(Testimony of J. F. Zumdieck.)

Cross-Examination

By Mr. Teu:

* * *

Q. All right. How long did the Alaska Steamship Company operate under the old contract of 1948?

A. Up until the time it was amended by agreement, I believe, in August.

Mr. Hull: July 14th.

Q. You operated under the old contract until that date? A. That is right. [566]

* * *

Trial Examiner Hunt: Company's Exhibit 1, which I [571] received in evidence, is on the letterhead of the PMA, at its office in San Francisco. It is dated May 11, 1950, addressed to members:

"Re: Posting Notices in ARA Case No. 20-CA-166, NLRB. Further to our circular to members of May 4, 1950.

"It has been determined that compliance with NLRB order of April 28, 1950, may be deferred, for a reasonable time, without risk of penalty, awaiting the outcome of present negotiations with the ARA on contract clauses replacing those found objectionable under such order.

"Accordingly, please disregard the instructions contained in our circular of May 4th and any orders posted according to those instructions should be removed and contractual relations, including hiring

practices with the ARA, should continue to be recognized as in the past.

"We will keep you fully informed as to developments in this matter.

"PACIFIC MARITIME
ASSOCIATION,

"J. B. BRYAN,
"Vice President."

(Document heretofore identified as Company's Exhibit No. 1, received in [572] evidence.)

* * *

(Documents referred to, previously marked for identification, Union's Exhibits Nos. 7 to 29, inclusive, received in evidence.) [573]

* * *

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ALASKA STEAMSHIP COMPANY,

and

AMERICAN RADIO ASSOCIATION, CIO,
Respondents.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, "In the Matter of Alaska Steamship Company, Employer and Horace W. Underwood (an individual), Cases Nos. 19-CA-277 and 19-CA-358" and "In the Matter of American Radio Association, CIO, and Horace W. Underwood (an individual), Cases Nos. 19-CB-90 and 19-CB-135," such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating A. Bruce Hunt, Trial Examiner for the National Labor Relations Board, dated February 26, 1951.

(2) Stenographic transcript of testimony taken before Trial Examiner Hunt on February 26 and 27 and March 26 to 28, 1951, together with all exhibits introduced in evidence, also rejected exhibits.

(3) Respondent Company's letter, dated April 7, 1951, requesting extension of time to file brief.

(4) Respondent Union's letter, dated April 7, 1951, requesting extension of time to file brief.

(5) Respondent Union's letter, dated April 25, 1951, requesting extension of time to file brief.

(6) Copies of Associate Chief Trial Examiner's telegrams, dated April 30, 1951, granting all parties extension of time to file briefs.

(7) Copy of Trial Examiner Hunt's Intermediate Report, dated July 3, 1951, (annexed to item (19) hereof); order transferring case to the Board, dated July 3, 1951, together with affidavit of service and United States Post Office return receipts thereof.

(8) Respondent Company's telegram, dated July 18, 1951, requesting extension of time to file exceptions and brief.

(9) Respondent Union's telegram, dated July 19, 1951, requesting extension of time to file exceptions and briefs.

(10) Copy of Board's telegram, dated July 20,

1951, granting all parties extension of time to file exceptions and briefs.

(11) Statement of exceptions received from Charging Party, Horace W. Underwood, on July 30, 1951.

(12) Respondent Company's exceptions to the Intermediate Report, received August 9, 1951.

(13) Respondent Union's telegram, dated August 10, 1951, requesting further extension of time to file exceptions and briefs.

(14) Copy of Board's telegram, dated August 10, 1951, granting all parties further extension of time to file exceptions and briefs.

(15) Respondent Union's telegram, dated August 17, 1951, requesting still further extension of time to file exceptions and briefs.

(16) Copy of Board's telegram, dated August 17, 1951, denying Respondent Union's request for still further extension of time to file exceptions and briefs.

(17) Respondent Union's letter, dated August 18, 1951, joining in the brief filed by Respondent Company with the exception of point 4 (pages 6 and 7).

(18) Respondent Union's exceptions to the Intermediate Report, received August 20, 1951.

(19) Copy of Decision and Order issued by the National Labor Relations Board on February 11, 1952, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 24th day of September, 1952.

/s/ LOUIS R. BECKER,
Executive Secretary.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 13559. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Alaska Steamship Company and American Radio Association, C.I.O., Appellee. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed September 30, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Alaska Steamship Company, (hereinafter called Respondent Company) its officers, agents, successors and assigns and American Radio Association, CIO (hereinafter called Respondent Union) its officers, representatives, agents, successors and assigns. The consolidated proceeding resulting in said Order is known upon the records of the Board as "In the Matter of Alaska Steamship Company, Employer, and Horace W. Underwood (an individual) Cases Nos. 19-CA-277 and 19-CA-358" and "In the Matter of American Radio Association, CIO, and Horace W. Underwood, (an individual) Cases Nos. 19-CB-90 and 19-CB-135."

In support of this petition the Board respectfully shows:

(1) Respondent Company is a Washington corporation engaged in business in the State of Washington and Respondent Union is a labor organiza-

tion engaged in promoting and protecting the interests of its members in the State of Washington, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on February 11, 1952, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent Company, its officers, agents, successors, and assigns and Respondent Union, its officers, representatives, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and

enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing those sections of the Board's said Order which relate specifically to the Respondents herein, and requiring Respondent Company, its officers, agents, successors and assigns and Respondent Union, its officers, representatives, agents, successors, and assigns to comply therewith.

NATIONAL LABOR
RELATIONS BOARD.

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 24th day of September, 1952.

[Endorsed]: Filed September 30, 1952.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding, petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board properly found that the Company violated Section 8 (a) (1) and (3) of the Act, as amended, by discriminating against Horace W. Underwood, and that the Union violated Section 8

(b) (2) and (1) (A) by causing the Company to do so.

2. The Board's order is in all respects valid and proper.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 24th day of September, 1952.

[Endorsed]: Filed September 30, 1952.

CA No. 13559

United States of America—ss.

The President of the United States of America

To: Alaska Steamship Company, Pier 42, Seattle, Wash., and American Radio Association, CIO, 3138 Arcade Bldg., Seattle, Wash.,

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10 (e)), you and each of you are hereby notified that on the 30th day of September, 1952, a petition of the National Labor Relations Board for enforcement of its order entered on February 11, 1952, in a proceeding known upon the records of the said Board as "In the Matter of Alaska Steamship Company, employer, and Horace W. Underwood (an individual) Cases Nos. 19-CA-

277 and 19-CA-358, and In the Matter of American Radio Association, CIO, and Horace W. Underwood (an individual), Cases Nos. 19-CB-90 and 19-CB-135," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 30th day of September, in the year of our Lord one thousand, nine hundred and fifty-two.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Received October 2, 1952.

Returned on Service of Writ attached.

[Endorsed]: Filed October 9, 1952.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT ALASKA STEAMSHIP COMPANY TO THE PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Comes now the Respondent Alaska Steamship Company (hereinafter called "Respondent Company") and for Answer to the petition for enforcement herein admits, denies and alleges as follows:

I.

Answering paragraph numbered (1) of the petition, admits that Respondent Company is a Washington corporation engaged in business in the State of Washington and within this judicial circuit; that American Radio Association, CIO (hereinafter called "Respondent Union") is a labor organization engaged in promoting and protecting the interests of its members in the State of Washington, and within this judicial circuit; that this Court has jurisdiction of the petition for enforcement herein by virtue of Section 10(e) of the National Labor Relations Act, as amended (hereinafter called the "Act"); and denies each and every other allegation contained in said paragraph numbered (1), and particularly denies that unfair labor practices occurred as alleged.

II.

Answering paragraph numbered (2) of the petition, admits that proceedings were had before the

Petitioner (hereinafter called the "Board") in the matter referred to in the petition, that on February 11, 1952, the Board stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent Company, its officers, agents, successors and assigns, and to Respondent Union, its officers, representatives, agents, successors, and assigns, and that the Board's Order was served upon respondents as alleged; and denies that due proceedings were had, that the Board duly stated the findings of fact and conclusions of law, or any of them, that the Board duly issued the Order, that the findings of fact and conclusions of law, or any of them, or the issuance of the Order were upon due proceedings had as alleged in said paragraph numbered (2).

III.

Answering paragraph numbered (3) of the petition, denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and therefore denies the same.

IV.

Further Answering said petition, the Respondent Company alleges:

(1) As used hereinafter in this Answer the word "find" means find and conclude, the word "found" means found and concluded, the word "finding" means finding and conclusion, the word "Examiner" means the Trial Examiner, the words "related findings" mean subsidiary and related findings of the

Examiner or the Board upon which in whole or in part the findings referred to are based, and the word "complainant" means the person in whose favor the Board entered a back pay order; where it is alleged in this Answer that a finding or findings are not supported by the evidence is meant in addition that the same are not supported by substantial evidence on the record considered as a whole and also that a contrary finding or findings would be supported by substantial evidence on the record considered as a whole and the preponderance of the evidence; where references are made to section numbers the same refer to sections of the Act.

(2) The Board in its Decision found that the act of removing complainant's name from the national assignment list of the Respondent Union constituted discrimination in violation of Sections 8(a)(1) and (3) by the Respondent Company and Sections 8(b)(1)(A) and (2) by the Respondent Union. Said findings, including related findings, are not supported by the evidence and are contrary to law.

(3) The Board in its Decision adopted the findings of the Examiner, to wit, that the Respondent Company discriminated against complainant on May 5, 1950, in violation of Sections 8(a)(3) and (1), and that, by causing the Respondent Company to do so, the Respondent Union violated Sections 8(b)(2) and (1)(A). Said findings, including related findings, are not supported by the evidence and are contrary to law.

(4) The Board in its Decision adopted the findings of the Examiner, to wit, that the failure to offer complainant the assignment as Second Radio Officer on the SS Alaska on May 5, 1950, filled by Lewis A. Deyo, was discriminatory within the meaning of the Act. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(5) The Board, in its Decision adopted the findings of the Examiner, to wit, that on May 5, 1950, complainant was unlawfully denied employment. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(6) The Board in its Decision adopted the findings of the Examiner, to wit, that the Respondent Union did not restore complainant's name to the national assignment lists of Respondent Union following March 29, 1949. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(7) The Board in its Decision adopted the findings of the Examiner, to wit, that complainant was or would have been entitled to referral by Respondent Union to the SS Alaska ahead of Lewis A. Deyo on May 5, 1950, under the principles of rotary hiring. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(8) The Board in its Decision adopted the findings of the Examiner, to wit, that Lewis A. Deyo's number on the Respondent Union's national assign-

ment list of January 7, 1950, was #815, rather than #793. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(9) The Board in its Decision adopted the findings of the Examiner, to wit, that preference in employment was accorded to members of Respondent Union and resulted in an unlawful denial of employment to complainant on May 5, 1950. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(10) The Board in its Decision adopted the findings of the Examiner, to wit, that the Respondent Company had knowledge of complainant's union or non-union affiliation at times material to this case. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(11) The Board in its Decision adopted the findings of the Examiner, to wit, that complainant would have chosen to stand by the SS Alaska following October 14, 1950. Said findings, and related findings, are not supported by the evidence and are contrary to law.

V.

Further Answering said petition, the Respondent Company alleges that the remedy ordered by the Board, and each portion thereof, is not supported by findings supported by the evidence, is not supported by the findings, will not effectuate the purposes of the Act, is in excess of the powers conferred upon the Board, and is not sustainable in

law; and in the following particulars, among others, the remedy ordered by the Board is not sustainable for one or more of the reasons stated above:

(1) In ordering that the Respondent Company offer any employment whatsoever to complainant as provided.

(2) In ordering that the Respondent Company and the Respondent Union jointly and severally, or in any manner, make whole in any manner the complainant for any alleged loss of pay whatsoever as provided.

(3) In ordering that the officers, agents, successors, and assigns of the Respondent Company, or any of them shall make whole in any manner the complainant for any alleged loss of pay whatsoever.

(4) In ordering that the Respondent Company and the Respondent Union cease and desist from engaging in certain acts or alleged unlawful labor practices, as provided, or from interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7, as provided.

VI.

Further Answering said petition, the Respondent Company alleges that the Order of the Board, and each portion thereof except that portion whereby certain allegations of the complaint are dismissed, is not supported by findings supported by the evidence, is not supported by the findings, will not effectuate the purposes of the Act, is in excess of

the powers conferred upon the Board, and is not sustainable in law.

VII.

Further Answering said petition, the Respondent Company alleges:

(1) The Board erred in failing and refusing to order the complaint dismissed in its entirety.

(2) The Board erred in failing and refusing to sustain each and all of the exceptions filed by Respondent Company to the Intermediate Report and Recommended Order of the Examiner.

(3) Without prejudice to its position heretofore or hereinafter asserted herein, the Respondent Company alleges that the Board erred in failing and refusing to find and affirmatively order that complainant should not be offered employment or awarded back pay because his unwillingness to accept employment opportunities amounted to a wilful incurrence of wage losses.

(4) Without prejudice to its position heretofore or hereafter asserted herein, the Respondent Company alleges that the Board erred in failing and refusing to find and affirmatively order that any award of back pay in favor of complainant should terminate not later than October 14, 1950.

(5) Without prejudice to its position heretofore or hereinafter asserted herein, the Respondent Company alleges that the Board erred in failing to find that the Respondent Union was responsible for the

discrimination, if any, suffered by complainant, and that the Board erred in failing to order that the Respondent Union only should be required to make whole the complainant for loss of pay, if any, sustained by the complainant as a result of such discrimination, if any.

(6) Without prejudice to its position heretofore or hereinafter asserted herein, the Respondent Company alleges that the Board erred in ordering that loss of wages, if any, suffered by complainant be computed on a quarterly basis.

Wherefore, having fully answered, the Respondent Company prays that this Honorable Court enter a degree denying the petition and refusing to enforce the Order of the Board, and that the Order be set aside in its entirety, or alternatively, that the Order be modified in the respects the same may be found to be improper, and that the Respondent Company receive such other and further relief as to this Honorable Court may seem just.

BOGLE, BOGLE & GATES,

/s/ EDWARD G. DOBRIN,

/s/ J. TYLER HULL,

Attorneys for Respondent, Alaska Steamship Company.

Duly verified.

Certificate of Mailing attached.

[Endorsed]: Filed October 15, 1952.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT AMERICAN RADIO ASSOCIATION, CIO, TO THE PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Come now the Respondent American Radio Association, CIO, (hereinafter called "Respondent Union") and for Answer to the petition for enforcement herein admits, denies and alleges as follows:

I.

Answering paragraph numbered (1) of the petition, admits that the Alaska Steamship Company (hereinafter called "Respondent Company") is a Washington corporation engaged in business in the State of Washington and within this judicial circuit; that Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the State of Washington, elsewhere in the United States, and all over the world, and within this judicial circuit; that this Court has jurisdiction of the petition for enforcement herein by virtue of Section 10(e) of the National Labor Relations Act, as amended, (hereinafter called the "Act"); and denies each and every other allegation contained in said paragraph numbered (1), and particularly denies that unfair labor practices occurred as alleged.

II.

Answering paragraph numbered (2) of the petition, admits that proceedings were had before the Petitioner (hereinafter called the "Board") in the matter referred to in the petition, that on February 11, 1952, the Board stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent Company, its officers, agents, successors and assigns, and to Respondent Union, its officers, representatives, agents, successors, and assigns, and that the Board's Order was served upon respondents as alleged; but only with respect to Horace W. Underwood, the Charging Party, denies that due proceedings were had, that the Board duly stated the findings of fact and conclusions of law, or any of them, that the Board duly issued the Order, that the findings of fact and conclusions of law, or any of them, or the issuance of the Order were upon due proceedings had as alleged in said paragraph numbered (2).

III.

Answering paragraph numbered (3) of the petition, denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and therefore denies the same.

IV.

Further Answering said petition, the Respondent Union alleges:

(1) The Board in its Decision and Order now sought to be enforced, overlooked its prior Decision

and Order in Case No. 20-CA-166, officially reported in 89 NLRB 894, in the proceedings entitled "In the Matter of Pacific Maritime Association, successor in interest to Pacific American Shipowners Association and its member Companies, and, Radio Officers Union, Marine Division, Commercial Telegraphers Union, AFL," issued by the Board on April 28, 1950, and hereafter, for brevity, referred to as the "Board's 1950 Order."

(2) By said Board's 1950 Order, the Board found, among other things, "that the mere execution of the contract" there involved, violated Section 8(a)(1) of the Act. The Board further found in said case a violation of Section 8(a)(1) "based solely upon the contractual provisions granting preference in hiring to members of" the Respondent Union.

(3) The Board in its Decision and Order now sought to be enforced, adopted the findings of the Trial Examiner that the Agreement between the Respondent Company and the Respondent Union (General Counsel's Exhibit 4 herein), which was entered into subsequent to the Board's 1950 Order, and the then concurrently adopted Respondent Union's "National Assignment Rules" (Respondent Union's Exhibit 1 herein), were lawfully administered without discrimination to members and nonmembers of the Respondent Union alike.

(4) The Board, in its Decision and Order now sought to be enforced, furthermore adopted the findings of its Trial Examiner that "Upon the evi-

dence, there being no showing that under the existing shipping rules a place on a national assignment list has been denied to a non-member under circumstances where it would not have been denied to a member, I find that there has been a failure of proof that the Union's shipping rules have been misapplied so as to result in discrimination against radio officers because of non-membership. Accordingly, the proof does not establish that the 1950 agreement has been unlawfully administered, and I shall recommend that the complaint be dismissed in all respects other than the allegations concerning Underwood, * * *"

(5) In said Board's 1950 Order, the Board, in referring to the contract between the Respondent Union and the Respondent Company, which was there under review, stated in footnote #9 thereof, as follows:

> "Nothing in our order herein shall be deemed to require the Respondents to vary or abandon any substantive provision of such agreement, or to prejudice the assertion by employees of any rights they may have acquired thereunder."

The Board has therefore overlooked its prior Order and more particularly its specific directive commanding the Respondent Union not "to vary or abandon any substantive provision of such agreement or to prejudice the assertion by employees of any rights they may have acquired thereunder."

(6) Without prejudice to its position heretofore

or hereinafter asserted herein, the Respondent Union alleges that the Board erred in directing the Respondent Union to make whole any losses which complainant Underwood may have sustained and in adopting the findings of the Examiner that complainant Underwood was or would have been entitled to referral by Respondent Union to the SS Alaska ahead of Lewis A. Deyo on May 5, 1950. To have made such a referral of complainant Underwood to the SS Alaska, ahead of Lewis A. Deyo, would have given said complainant Underwood a position of advantage and preference over other employees of Respondent Company and of other employers, as to any rights which said employees may have acquired under the contract referred to in the Board's 1950 Order and under the present contract (General Counsel's Exhibit 4), and Respondent Union's National Assignment Rules thereunder (Respondent Union's Exhibit 1), all of which have been found valid and subsisting by the Board in the instant Order which it now seeks to enforce.

V.

Further Answering said petition, the Respondent Union alleges:

(1) As used herein in this Answer the word "find" means find and conclude, the word "found" means found and concluded, the word "finding" means finding and conclusion, the word "Examiner" means the Trial Examiner, the words "related findings" mean subsidiary and related findings of the Examiner or the Board upon which in whole or in

part the findings referred to are based, and the word "complainant" means the person in whose favor the Board entered a back pay order; where it is alleged in this Answer that a finding or findings are not supported by the evidence is meant in addition that the same are not supported by substantial evidence on the record considered as a whole and also that a contrary finding or findings would be supported by substantial evidence on the record considered as a whole and the preponderance of the evidence; where references are made to section numbers the same refer to sections of the Act.

(2) The Board in its Decision found that the complainant's name was removed from the national assignment list of the Respondent Union and therefore found that it constituted discrimination in violation of Sections 8(a)(1) and (3) by the Respondent Company and Sections 8(b)(1)(A) and (2) by the Respondent Union. Said findings, including related findings, are not supported by the evidence and are contrary to law. Moreover, the Board erred in failing to find that radio officers assigned to vessels after the execution of the 1950 agreement between the Respondent Union and the Association of which the Respondent Company is a member, or other radio officers assigned to positions aboard vessels of the Company were not required to be members of the Union as a condition of employment aboard such vessels.

(3) The Board in its Decision adopted the find-

ings of the Examiner, to wit, that the Respondent Company discriminated against complainant on May 5, 1950, in violation of Sections 8(a)(3) and (1), and that, by causing the Respondent Company to do so, the Respondent Union violated Sections 8(b)(2) and (1)(A). Said findings, including related findings, are not supported by the evidence and are contrary to law. Moreover, the Board erred in failing to find that complainant limited his availability to employment in the shipping industry based upon job availability and seniority only with and confined to the Alaska Steamship Company, and that to have recognized such limited availability the Respondent Union would thereby have discriminated against all Union and non-Union job applicants who had an equal or prior right to that of complainant, to an assignment for work.

(4) The Board in its Decision adopted the findings of the Examiner, to wit, that the failure to make available to the complainant an assignment as Second Radio Officer on the SS Alaska on May 5, 1950, filled by Lewis A. Deyo, was discriminatory within the meaning of the Act. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(5) The Board, in its Decision adopted the findings of the Examiner, to wit, that on May 5, 1950, complainant was unlawfully denied employment. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(6) The Board in its Decision adopted the findings of the Examiner, to wit, that the Respondent Union did not restore complainant's name to the national assignment lists of Respondent Union following December 29, 1949. Said findings, and related findings, are not supported by the evidence and are contrary to law. Moreover, the Board erred in failing to find that complainant's name was removed from the Respondent Union's lists at complainant's request because he preferred to seek employment through channels other than through the Respondent Union.

(7) The Board in its Decision adopted the findings of the Examiner, to wit, that complainant was or would have been entitled to referral by Respondent Union to the SS Alaska ahead of Lewis A. Deyo on May 5, 1950, under the principles of rotary hiring. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(8) The Board in its Decision adopted the findings of the Examiner, to wit, that Lewis A. Deyo's number on the Respondent Union's national assignment list of January 7, 1950, was #815, rather than #793. Said findings, and related findings, are not supported by the evidence and are contrary to law. Moreover, the Board erred in failing to find that complainant's name being numbered 828 on the Respondent Union's assignment list of December 31, 1949, and numbered 793 on the list of January 7, 1950, were related numbers of standing on said lists, wholly unconnected with complainant's

membership or non-membership in the Respondent Union.

(9) The Board in its Decision adopted the findings of the Examiner, to wit, that preference in employment was accorded to members of Respondent Union and resulted in an unlawful denial of employment to complainant on May 5, 1950. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(10) The Board in its Decision adopted the findings of the Examiner, to wit, that the Respondent Company had knowledge of complainant's union or non-union affiliation at times material to this case. Said findings, and related findings, are not supported by the evidence and are contrary to law. Moreover, the Board erred in failing to find that Respondent Union gave no consideration to complainant's status as a union member in connection with job referrals.

(11) The Board in its Decision adopted the findings of the Examiner, to wit, that complainant would have chosen to stand by the SS Alaska following October 14, 1950. Said findings, and related findings, are not supported by the evidence and are contrary to law.

(12) The Board erred in failing to find that the Respondent Union offered, and complainant accepted an assignment to a permanent position aboard the SS Pacificus immediately after complainant removed the limitations and restrictions

as to the kind of job he would accept, which evidenced the absence of any discrimination imposed upon complainant by the Respondent Union.

VI.

Further Answering said petition, the Respondent Union alleges that the remedy ordered by the Board, and each portion thereof, is not supported by findings which have any support by the evidence, and is not supported by the findings, will not effectuate the purposes of the Act, is in excess of the powers conferred upon the Board, and is not sustainable in law; and in the following particulars, among others, the remedy ordered by the Board is not sustainable for one or more of the reasons stated above:

(1) In ordering that the Respondent Company offer any employment whatsoever to complainant as provided, and to the requirement that both Respondents cease and desist from engaging in unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

(2) In ordering that the Respondent Company and the Respondent Union jointly and severally, or in any manner, make whole in any manner the complainant for any alleged loss of pay whatsoever as provided.

(3) In ordering that the Respondents shall make whole in any manner the complainant for any alleged loss of pay whatsoever.

(4) In ordering Respondent Union to perform

all those certain affirmative acts, not heretofore specifically mentioned and referred to above.

(5) In ordering that the Respondent Company and the Respondent Union cease and desist from engaging in certain acts or alleged unlawful labor practices, as provided, or from interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7, as provided.

VII.

Further Answering said petition, the Respondent Union alleges that the Order of the Board, and each portion thereof except that portion whereby certain allegations of the complaint are dismissed, is not supported by findings supported by the evidence; is not supported by the findings, will not effectuate the purposes of the Act, is in excess of the powers conferred upon the Board, and is not sustainable in law.

VIII.

Further Answering said petition, the Respondent Union alleges:

(1) The Board erred in failing and refusing to order the complaint dismissed in its entirety.

(2) The Board erred in failing and refusing to sustain each and all of the exceptions filed by Respondent Union to the Intermediate Report and Recommended Order of the Examiner.

(3) Without prejudice to its position heretofore or hereinafter asserted herein, the Respondent

Union alleges that the Board erred in failing and refusing to find and affirmatively order that complainant should not be offered employment or awarded back pay because his unwillingness to accept employment opportunities amounted to a wilful incurrence of wage losses.

(4) Without prejudice to its position heretofore or hereinafter asserted herein, the Respondent Union alleges that the Board erred in failing and refusing to find and affirmatively order that any award of back pay in favor of complainant should terminate not later than October 14, 1950.

(5) Without prejudice to its position heretofore or hereinafter asserted herein, the Respondent Union alleges that the Board erred in failing to find that the Respondent Company was responsible for the discrimination, if any, suffered by complainant, and that the Board erred in failing to order that the Respondent Company only should be required to make whole the complainant for loss of pay, if any, sustained by the complainant as a result of such discrimination, if any.

(6) Without prejudice to its position heretofore or hereinafter asserted herein, the Respondent Union alleges that the Board erred in ordering that loss of wages, if any, suffered by complainant be computed on a quarterly basis.

Wherefore, having fully answered, the Respondent Union prays that this Honorable Court enter a

decree denying the petition and refusing to enforce the Order of the Board, and that the Order be set aside in its entirety, or alternatively, that the Order be modified in the respects the same may be found to be improper, and that the Respondent Union receive such other and further relief as to this Honorable Court may seem just.

/s/ JAY A. DARWIN,
Attorney for Respondent, American Radio Association, CIO.

Duly verified.

[Endorsed]: Filed December 1, 1952.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH RESPONDENT, AMERICAN RADIO ASSOCIATION, CIO, INTENDS TO RELY

In this proceeding, respondent, American Radio Association, CIO, will urge and rely upon the following points:

1. The Board's finding that the Respondent Company violated Section 8(a)(1) and (3) of the Act, as amended, by discriminating against Horace W. Underwood, and that the Respondent Union violated Section 8(b)(2) and (1)(A) by causing the Company to do so, was invalid and improper.

2. The Board's order, only as to Horace W. Underwood, is in all respects invalid and improper.

Dated at San Francisco, California, this 28th day of November, 1952.

/s/ JAY A. DARWIN,
Attorney for Respondent, American Radio Association, CIO.

[Endorsed]: Filed December 1, 1952.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated and agreed among the parties to the within appeal that none of the Exhibits which have been introduced by any of the parties need be printed for the Court, and that the Court may use and consider the original Exhibits now on file in the above-entitled case.

Dated: December 17, 1952.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

BOGLE, BOGLE & GATES,

By /s/ J. TYLER HULL,
Attorneys for Alaska
Steamship Co.

BASSETT & GEISNESS,

By /s/ JOHN GEISNESS,
Attorneys for Horace W. Underwood.

/s/ JAY A. DARWIN,
Attorney for American Radio Association, CIO.

So Ordered:

/s/ WILLIAM DENMAN,

/s/ WM. HEALY,

/s/ WALTER L. POPE,
Circuit Judges.

[Endorsed]: Filed January 13, 1953.